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# CURRENT LEGAL PROBLEMS

## 1955

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AND

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*On behalf of*
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# PREFACE

THIS volume contains the public lectures on Current Legal Problems delivered in the Faculty of Laws at University College, London, during the Session, 1954–1955, together with the text of Professor Hanbury's Presidential Address to the Bentham Club.

The editors wish to express their thanks to the publishers and printers for their customary expedition in producing the volume, and also to Mr D. J. Payne, the Assistant Editor of this volume, for reading the proofs and preparing the tables of cases, statutes and treaties, as well as the index.

THE EDITORS

University College, London
*April,* 1955

I

# THE POSITION OF THE FOREIGN SOVEREIGN BEFORE ENGLISH COURTS

H. G. Hanbury

## INTRODUCTION

The Books of the Kings give us no information as to the precise nature of the hard questions posed by Bilkees, Queen of Sheba, on her visit to King Solomon. But his ingenuity would indeed have been taxed by a question as to her position as a litigant before his courts. Leontes' scheme of treatment of Polixenes was more drastic than that of litigation. In ancient and early medieval times visits by one sovereign to the territories of another were rare, and jurists could not imagine that they presented any particular problem. Coke seems to have assumed that a foreign sovereign visiting England could sue and be sued in English courts.[1] He sheds no light on the legality of the imprisonment and execution of Mary, Queen of Scots. Vattel takes the easy way out, that at that time she was no longer sovereign, having abdicated in 1567,[2] when her baby son was crowned James VI.[3] But her abdication was forced, and from England in 1569 she declared that nothing would induce her to give up her Crown.[4] Certainly her defenders made full use of the maxim *par in parem non habet potestatem*.[5] It is probably fruitless, in the unhappy history of Mary Stuart, to attempt to extricate the law from the network of policy.

The legal problem, so casually touched upon by Coke, was destined to enjoy a longer period of slumber. We look in vain through Blackstone for any mention of it. It was not until the very end of the eighteenth century that the case-law took its origin; in the nineteenth century it grew steadily to maturity, and advanced with giant strides in the twentieth, when the

1 *Calvin's Case* (1609) 7 Co. Rep. 1a.
2 *Law of Nations* (1793 ed.), p. 440.
3 Lang, *Short History of Scotland*, p. 130.
4 Neale, *Queen Elizabeth*, p. 174.
5 Camden, *History of Elizabeth*, p. 370, cited by Phillimore, *International Law*, Vol. 2, p. 137.

emphasis shifted from the persons of sovereigns to the property of sovereign states.

Two postulates soon become clear: (1) in cases involving the rights and interests of foreign sovereigns, the judiciary must beware of invading the field of foreign affairs, which belongs to the executive, (2) several converging reasons demand certain immunities for a foreign sovereign, which to a private litigant are unknown. Postulate (1) is explicable simply in terms of the rules governing the treaty-making powers of the Crown. Foreigners resident abroad owe the Crown no allegiance, and the Crown owes them no protection. A treaty made by the Crown with a foreign power needs no legislative endorsement unless it purports in some way to abridge the rights of British subjects. If it avoids this pitfall, it is an act of state, in the widest sense of that term, and is not cognisable by the courts.[6] The earliest case is *Nabob of The Carnatic* v. *East India Co.*[7] A debt was alleged to be due from the plaintiff to the defendant, for which the plaintiff assigned part of his territories as security; the plaintiff pressed for an account as to the state of their mutual financial obligations. The plea of 'act of state' before Lord Thurlow suggested that the treaty was mercantile, and he decided that it must be invalid, but a fuller answer before Lord Commissioner Eyre disclosed that, though it contained mercantile elements, its essence was political, being in the nature of a treaty between two sovereign powers, and so, though one of them was also a subject of the Crown, the matter was beyond the competence of a municipal court. Through the long symphony of acts of state the same motif is constant. A span of 160 years divides *Barclay* v. *Russell*[8] in 1793 from *Civil Air Transport* v. *Central Air Transport Corporation*[9] in 1953, yet in both cases the Court performed the same act of self-abnegation, ignoring in the earlier confiscatory legislation which purported to cover property outside the sovereign's jurisdiction, in the later the policy of a sovereign in disposing of his own chattels. In *Republic of Italy* v. *Hambros Bank*,[10] the Custodian of Enemy Property, to whom

[6] See Sir W. Harrison Moore, *Acts of State in English Law, passim.*
[7] (1791) 1 Ves. 370; (1793) 2 Ves. 56.
[8] (1797) 3 Ves. 423.
[9] [1953] A.C. 70.
[10] [1950] 1 All E.R. 430. This account is taken *verbatim* from Hanbury, *Modern Equity,* 6th ed., p. 651.

the estate of ex-King Victor Emmanuel III had passed, paid, under directions of the Board of Trade, sums out of it by way of death duties, and transferred the balance to the defendant bank. The Italian Government sought an injunction to restrain the bank from dealing with the property, basing their claim on the Financial Agreement of 1947 between the United Kingdom and Italy, in that, for want of this property, the funds available for discharging their obligations under the agreement were decreased. It was held that the injunction could not be granted, because the Financial Agreement belonged exclusively to the executive field, and was not justiciable by the courts.

*Barclay* v. *Russell*[11] to some extent anticipates the line of modern cases, to which I must later devote some attention, establishing that our courts will not enforce foreign penal laws.[12] But the exigencies of postulate (2) do enable the executive, by conferring on a potential litigant the status of foreign sovereign, to do indirectly what it cannot do directly, to deprive the subject of his rights.[13] From this conclusion Sir Robert Phillimore showed himself, in the *Parlement Belge*,[14] to be averse. He was as far inclined in favour of human rights as was Lord Esher in favour of the opposite ideal of unbounded privilege for a foreign sovereign.[15] Membership of this class is often stated to be a matter for judicial notice, and it may well be that there are many powers whose actual status is notorious. But even they may make a claim as to which the judge should seek information[16]; and in the case of smaller states, and especially those whose independence is doubtful,[17] he must satisfy himself as to status before he can entertain a claim of privilege. Normally the correct source of information is the Foreign Office,[18] whose

11 (1797) 3 Ves. 423.
12 *Post*, pp. 16–18.
13 Keir and Lawson, *Cases in Constitutional Law*, 4th ed., p. 104.
14 (1879) 4 P.D. 129.
15 As to the bias of Lord Esher in favour of the executive in domestic litigation, see Hanbury, 68 *L.Q.R.*, p. 173, at pp. 179, 182, 185.
16 *The Eolo* [1918] 2 K.B. (Ir.) 78. It is submitted that it was dangerous in this case to suggest that, when a claim is made by a foreign ruler to a ship as a public vessel, the Court should not entertain any evidence to rebut the claim. For how if the Khedive of Egypt, in *The Charkieh* (1873) L.R. 4 A. and E. 59, had advanced a similar claim?
17 *The Charkieh* (1873) L.R. 4 A. and E. 59; *Foster* v. *Globe Venture Syndicate* [1900] 1 Ch. 811.
18 In *Statham* v. *Statham and Gaekwar of Baroda* [1912] P. 92 it was the old India Office, in *Sayce* v. *Ameer Ruler of Bahawalpur State* [1952] 2 Q.B. 390 the Commonwealth Relations Office.

reply is conclusive. Thus the certificate in *The Gagara*[19] established the sovereign status of the Esthonian National Council, in *Luther* v. *Sagor*[20] that of the Soviet Government of Russia, in *Duff Development Co.* v. *Government of Kelantan*[21] that of one of the Malay States. Whether consciously or not, the Foreign Office has tended to apply both tests laid down by Austin in his famous definition of sovereignty.[22] For the cases establish that the status will be denied to a ruler who fails to show, not only that he receives habitual obedience from a society, but also that he has ceased to yield obedience to a human superior. In *Thompson* v. *Powles*[23] it was denied to Guatemala, then in revolt against Spain, in *The Charkieh*[24] to the Khedive of Egypt, in *The Annette; The Dora*[25] to the Provisional Government of Northern Russia. The reply of the appropriate Government Department on this matter is final, and Sir Robert Phillimore's independent researches, with which he regales us in *The Charkieh,*[26] though interesting from the historical, are redundant from the juristic point of view. In *Krajina* v. *Tass Agency*[27] the Court of Appeal were resolute to grant immunity to a defendant whose sovereign status would, in the eyes of a layman, have been a surprising proposition; not only did they act on a certificate from the Russian Ambassador, unendorsed by any pronouncement from the Foreign Office, but went out of their way to rescue him from a snare in which he might have been entrapped through his ignorance of the niceties of English law, for they

[19] [1919] P. 95.
[20] [1921] 3 K.B. 532.
[21] [1924] A.C. 797.
[22] *Province of Jurisprudence Determined,* Lecture 6 (Hart's ed., p. 194). Cf. *per* Kay, L.J., in *Mighell* v. *Sultan of Johore* [1894] 1 Q.B. 149 at 162, 'if he is not an independent sovereign, he must be a dependent one'.
[23] (1828) 2 Sim. 194; cf. *Taylor* v. *Barclay* (1828) 2 Sim. 213.
[24] (1873) L.R. 4 A. and E. 59. In *Statham* v. *Statham and Gaekwar of Baroda* [1912] P. 92, the full privileges of a foreign sovereign were accorded to the co-respondent, notwithstanding the suzerainty of the King-Emperor.
[25] [1919] P. 105.
[26] (1873) L.R. 4 A. and E. 59; cf. the remarks of Lord Esher in *Mighell* v. *Sultan of Johore* [1894] 1 Q.B. 149. An echo of Phillimore's views is found in the speech of Lord Sumner in *Duff Development Co.* v. *Government of Kelantan* [1924] A.C. 797 at 824, some passages in which imply that where the reply of the Government Departments leaves doubts, these may be resolved by applying ordinary legal principles, but this opinion is disapproved by Lord Atkin in *The Arantzazu Mendi* [1939] A.C. 256 at 262, and Somervell, L.J., in *Sayce* v. *Ameer Ruler of Bahawalpur State* [1952] 2 Q.B. 390 at 393.
[27] [1949] 2 All E.R. 274.

declined to accept his statement, made on the strength of the domestic statute establishing the agency and its compliance with the Registration of Business Names Act, 1916, that it was a legal entity as well as part of the sovereign power.[28]

Two interlocked questions present themselves at this point, as to the difference, if any, between recognition *de jure* and *de facto,* and as to the retroactive effect of recognition. The maxim *inter arma silent leges* has little application where the courts of neutral states are concerned. For in a war, whether international or civil, the ebb and flow of events may cause bewildering fluctuations in the inherence of the sovereign power. *U.S.A.* v. *McRae*[29] and *Luther* v. *Sagor*[30] are authorities for the proposition that, for the purpose of the broad principle that our courts will not inquire into the acts of a foreign sovereign, it matters not whether that sovereign has been recognised *de jure* or *de facto*. But the rights of the sovereign *de jure* will often be in suspended animation, until the favourable or adverse turn of events restores complete vitality, or converts slumber into death. In the *McRae Case*[31] the former eventuality happened. The United States Government sought to recover property in the hands of an agent of the extinguished Confederate Government. James, V.-C., held that the property must fall into two halves; that which belonged to the United States Government at the outbreak of war could be recovered unconditionally, but that which had been acquired by the *de facto* sovereign in the exercise of its short-lived though recognised authority could be recovered only on the same footing as it could have been recovered by that *de facto* sovereign itself, that is to say, subject to account being taken of any sums due from it to the agent. This being a concession which a restored *de jure* sovereign finds it politically impossible to make, he must necessarily in practice sacrifice such property. In *Luther* v. *Sagor*[32] the Soviet Government, under a decree of June, 1918, had seized the plaintiff's sawmill in

[28] Here distinguish *Compania Mercantil Argentina* v. *U.S. Shipping Board* (1924) 131 L.T. 388, where the statement made it quite clear that the defendant was a department of state. Cohen, L.J., was actually prepared to say that even the conferment by the domestic statute of the status of a juristic entity would not necessarily have divested Tass of its immunity as a foreign sovereign: [1949] 2 All E.R. 274 at 280–281.

[29] (1869) L.R. 2 Eq. 69.

[30] [1921] 3 K.B. 532.

[31] (1869) L.R. 2 Eq. 69.

[32] [1921] 3 K.B. 532.

Russia, and sold much of the stock to the defendants, who had imported it into England. The validity of the sale could not be impugned, if at the relevant date the Soviet Government had been recognised as the *de facto* sovereign of Russia. The only Foreign Office statement available to Roche, J., fell far short of asserting such a status, so he was fully justified in giving judgment for the plaintiff,[33] but by the time of the hearing of the appeal, the Foreign Office had unequivocally recognised the Soviet Government as *de facto* sovereign, and Roche, J., was reversed on this further and vital fact.

No complication was here caused by the presence in the background of a *de jure* sovereign, whose restoration might seem a possibility. But the difficult factor of dual sovereignty certainly existed in the crop of cases produced by the Italo-Abyssinian War, and the Civil War in Spain.[34] In *Bank of Ethiopia* v. *National Bank of Egypt*[35] it was held, in effect, that there was nothing inconsistent in a simultaneous recognition of the Italian Government as sovereign *de facto,* and the Emperor Haile Selassie as sovereign *de jure,* and so our courts must accord validity to a decree of the former winding up the plaintiff bank. But if the property is situated in England, a *de jure* sovereign can assert his title to it before an English court, which may adjudicate on the matter if this can be done without impleading the sovereign *de facto.* This is the result of the first case of *Haile Selassie* v. *Cable and Wireless,*[36] and also of the second while before Bennett, J.[37] But then, as in *Luther* v. *Sagor,*[38] the position changed while the appeal was pending. Our Foreign Office having acknowledged the King of Italy as Emperor of Ethiopia, no scintilla of sovereignty was left in the former emperor, whose title to the property was divested. In *Banco de Bilbao* v. *Sancha,*[39] the Court of Appeal, though our Government continued to recognise the Communist Government as *de jure* sovereign of the whole of Spain, yet ignored legislation whereby it purported to transfer the assets of the plaintiff bank to Valencia,

[33] [1921] 1 K.B. 456.
[34] See McNair, 57 *L.Q.R.*, p. 33, at p. 58.
[35] [1937] Ch. 513.
[36] [1938] Ch. 839.
[37] [1939] Ch. 182.
[38] [1921] 3 K.B. 532.
[39] [1938] 2 K.B. 176. Cf. *The Arantzazu Mendi* [1939] A.C. 256; *Gdynia Amerika Line* v. *Boguslawski* [1953] A.C. 11.

that bank being situated in territory over which General Franco was recognised as sovereign *de facto*.

In the second case of *Haile Selassie* v. *Cable and Wireless*[40] the retroactive effect of recognition was assumed. Actually there was no binding English authority on the point, and the dicta of Scrutton, L.J., in *Luther* v. *Sagor*[41] are considerably less confident than are those of Warrington, L.J., in the same case. The only positive decision is one of the Supreme Court of the United States, *Oetjen* v. *Central Leather Co.*,[42] to the effect that recognition of an authority as a foreign sovereign *de jure* by the political department of the United States Government validates all acts of that authority from the beginning of its existence. But surely this doctrine might produce anomalous results, for an act done before recognition might be ruled invalid for lack of recognition, while a precisely similar act, on which there had been no litigation, must be ruled valid in the light of subsequent recognition. Executive and judiciary would work better together in this matter were the executive to indicate a date from which recognition is to be regarded as effective.[43]

The rest of this paper must fall under three headings, the extent and implications of the immunity, exceptions to the rule of immunity, and the bases on which the immunity rests.

## THE EXTENT AND IMPLICATIONS OF THE IMMUNITY

Phrases which are often repeated have a tendency to degenerate into clichés, and of no phrase is this truer than 'a foreign sovereign must not be impleaded'. Lord Atkin, in *Compania Naviera Vascongado* v. *S.S. Cristina*,[44] put this in the simplest language by laying down that he must not, against his will, be made a party to legal proceedings. He went on to enunciate a second rule, that our courts will not seize or detain the property of a sovereign. But this is really part of the main rule, in that an interference with such property must amount to an indirect

[40] [1939] Ch. 182.
[41] [1921] 3 K.B. 532.
[42] (1924) 246 U.S. 295. In *Underhill* v. *Hernandez* (1897) 168 U.S. 250, Fuller, C.J., inclined to extreme views of the immunity of foreign sovereigns *and their agents*; he seems to go perilously near to according to a mere belligerent a right which should properly belong only to a *successful* belligerent, who has established himself as a foreign sovereign.
[43] The recognition was precise as to time in *Gdynia Amerika Line* v. *Boguslawski* [1950] 1 K.B. 157; [1951] 1 K.B. 162; [1953] A.C. 11.
[44] [1938] A.C. 485 at 490. Cf. Dicey, *Conflict of Laws*, 6th ed., p. 132.

impleading, as the foreign sovereign must intervene by proxy to protect his rights.

If we except *Ex-Duke of Brunswick* v. *King of Hanover,*[45] which was complicated by the dual status of the defendant as foreign sovereign and as British subject and member of the House of Lords, cases concerning the activities of foreign sovereigns in their public, are anterior to those in their private capacities. Page-Wood, V.-C., in *Gladstone* v. *Ottoman Bank*[46] seems to have thought that the Court might take cognisance of a contract for a sovereign's private benefit, as opposed to one entered into in his public capacity. But the door is slammed on this view by *Mighell* v. *Sultan of Johore,*[47] and double-locked by *Statham* v. *Statham and Gaekwar of Baroda.*[48] Furthermore, English law knows nothing of the distinction, often elusive, which has been made in other countries, between acts *iure gestionis* and *iure imperii,*[49] but with a lack of discrimination which must work hardship to British subjects, and is not necessarily productive of a practical advantage to foreign sovereigns, inexorably prohibits all process whereby the latter might be embarrassed. Some of the earliest cases are those arising out of the loan of money, and provision of ships, negotiated in England in 1831 to expel from Portugal the usurper Don Miguel, and restore to the throne Queen Maria II.[50] In *De Haber* v. *Queen of Portugal*[51] the creditor pursued the only possible method of getting the debtor, notionally, before the court, attachment of money in the hands of her garnishees in London. Prohibition issued at the suit of the Queen of Portugal to the Lord Mayor's Court, to prevent the

[45] (1843) 6 Beav. 1; (1848) 2 H.L.C. 1. The plaintiff was taking advantage of the physical presence of the defendant in England to bring his action. He had been deposed by the German Diet, and the defendant had been appointed his guardian. He sued to recover his property. He made the point that the status of *prodigus,* under which he laboured in Germany, was unknown to English law. But this was held to be immaterial, in that the sovereign character of the defendant must prevail in the case of acts done abroad.

[46] (1863) 1 H. and N. 505.

[47] [1894] 1 Q.B. 149 (immunity from jurisdiction in respect of breach of promise of marriage).

[48] (1912] P. 92 (foreign sovereign cannot be made co-respondent in a suit for divorce).

[49] See Allen, *The Position of Foreign States before National Courts,* p. 30; Lauterpacht, 'The Problem of Jurisdictional Immunities of Foreign States' (1951) *British Year Book of International Law,* p. 220, at p. 222.

[50] Livermore, *History of Portugal,* p. 418.

[51] (1851) 17 Q.B. 171 at 196; see also *Glyn* v. *Soares* (1835) 1 Y. and C. Ex. 644; (1837) 7 Cl. and Fin. 466.

continuance of the action, on the ground of her sovereign character.[52] Bonds issued by a foreign sovereign, as was later pointed out by Jessel, M.R., in *Twycross* v. *Dreyfus,*[53] may constrain that sovereign in honour, but not in law.

The bulk of the cases concern the immunity of public ships.[54] The *fons et origo* of the law and practice, English as well as American, is to be found in the famous judgment of Marshall, C.J., in *The Schooner Exchange* v. *McFadden.*[55] He expressed himself as treading 'an unbeaten path', and laid it down that a warship of a foreign sovereign, at peace with the United States, and coming into a port of the United States, is immune from the jurisdiction of United States courts, which can therefore entertain no claim of title to the ship by a private individual.[56]

He made a curious reservation, based on the assumption that the ship 'demeaned herself in a friendly manner'. No subsequent case decides what would be the position, were her conduct hostile, or her entry clandestine. While the American law remained for over a century static, English law in 1880 extended the immunity to other public ships.[57] In the *Parlement Belge*[58] Phillimore, always the champion of individual rights, was reversed by a Court of Appeal, whose judgment was delivered by that eager enthusiast for the sanctity of executive authority, Brett, L.J. Phillimore had refused the Belgian ship immunity from seizure in respect of a collision on the ground that though she was owned by the King of the Belgians and her officers were commissioned by him, yet she was a trading vessel. His judgment is still an authority for the inability of the Crown, by treaty

[52] Simultaneously tried was *Wadsworth* v. *Queen of Spain* (1851) 17 Q.B. 171, where the result was the same; prohibition had here been applied for at the suit of the garnishees, but Lord Campbell was of opinion that it would issue at the suit of a stranger, for an inferior court, in exceeding its jurisdiction, commits a contempt of the Crown.

[53] (1877) 5 Ch.D. 605 at 616.

[54] See Hyde, *International Law,* 2nd ed., Vol. 2, p. 838.

[55] (1812) 7 Cranch 116.

[56] Or even by another foreign sovereign: see *Monaco* v. *Mississippi* (1933) 292 U.S. 313.

[57] For a salvage claim against a foreign warship, see *The Prins Frederick* (1820) 2 Dods. 451.

[58] (1879) 4 P.D. 129; (1880) 5 P.D. 197. That Phillimore was fully prepared to concede the immunity of warships is seen by his judgment in *The Constitution* (1879) 4 P.D. 39. He placed his own decision in *The Charkieh* (1873) L.R. 4 A. and E. 59, on two grounds, (1) the Khedive was not an independent sovereign, (2) the ship was a trading vessel. In view of the *Parlement Belge Case* (2) is presumably cut away.

and without Parliamentary sanction, to clothe a foreign vessel with immunity from suit so as to abridge the rights of British subjects, but its field of operations is restricted by the Court of Appeal, in that the immunity is extended from warships to other public vessels, notwithstanding that they may incidentally be engaged in trade. What is the test of a ship's public character? Is ownership by the state sufficient? The only English authority to this effect is *The Porto Alexandre,*[59] but the doctrine is disapproved by all the Lords in *The Cristina*[60] who mention the case. In all the other cases in which immunity was conceded more than mere ownership by the foreign sovereign was shown. In *The Messiano*[61] and *The Eolo*[62] the ship was privately owned, but requisitioned by an allied government[63] and employed under its orders for public purposes. In *The Crimdon*[64] she was under charter to the United States, in *The Gagara*[65] she had been seized in Tallinn harbour by the Esthonian National Council as prize, the property of an enemy, in *De Howorth* v. *S.S. India,*[66] a South African case, she was both the property of the Portuguese Government and used by it for obtaining revenue for the State by trading, in *The Cristina*[67] the seizure, on behalf of the Communist Government of Spain, had been effected by the Spanish Consul at Cardiff, who had put a new master in charge. These cases all go to show that public ownership is not decisive to ground immunity, nor private ownership to oust it; the true tests are control through requisition, or possession for public purposes. Trading by states for public purposes is a practice of modern growth; the first case in the United States in which the immunity due to a warship was extended to a merchant ship, owned and possessed by a foreign sovereign, was in 1925, *Berizzi Bros.* v. *S.S. Pesaro.*[68] But it was refused in *Republic of*

[59] [1920] P. 30.
[60] [1938] A.C. 485.
[61] (1916) 32 T.L.R. 519.
[62] [1918] 2 K.B. (Ir.) 78.
[63] The same immunity would have been conceded in the case of requisition by a neutral power.
[64] (1918) 35 T.L.R. 81. See Allen, *op. cit.*, p. 40.
[65] [1919] P. 95.
[66] [1921] C.P.D., Part 3, 451.
[67] [1938] A.C. 485.
[68] (1925) 271 U.S. 562; see also *Compania Espanola de Navegacion Maritima S.A.* v. *The Navemar* (1937) 303 U.S. 68. Allen, *op. cit.*, p. 40; Lauterpacht, *op. cit.*, p. 269.

*Mexico* v. *Hoffman*,[69] where the ship, though owned by the Mexican Government, was in the possession of a private corporation, and engaged in private commercial adventures.

*The Porto Alexandre*[70] was not the only target for disapproval in *The Cristina*.[71] Lords Wright and Maugham were very dubious also of the opinion of Scrutton, L.J., in *The Jupiter*,[72] that it is enough for a foreign sovereign to make a claim to property, in order to put the determination of its ownership beyond the competence of English courts.[73] Their doubts found powerful reinforcement in the judgment of Earl Jowitt in *Ysmael* v. *Republic of Indonesia*.[74] The foreign sovereign cannot bring the process of the courts to a stop by his *ipse dixit;* he 'must produce evidence to satisfy the court that his claim is not merely illusory, nor founded on a title manifestly defective'.[74a] If such evidence is not forthcoming, the foreign sovereign cannot show that he is being impleaded, and so can establish no *locus standi*.

It remains to consider whether the immunity may embrace agents, alienees, or bailees of a foreign sovereign. It has been said that a man who is acting solely for a foreign sovereign cannot be sued for breach of contract, as the protection which covers his principal covers him also. But it is submitted that the two cases cited in support of this proposition might be rested on other grounds. In *Twycross* v. *Dreyfus*[75] the Peruvian Government had issued bonds through the defendant, who had of course disclosed the fact of his agency. He therefore dropped out of the transaction as would the agent of any other principal. In *Gladstone* v. *Ottoman Bank*,[76] the Sultan had given twice over the monopoly of issuing bank notes in Turkey, once to the plaintiffs, once to the bank; it was held that the court, having no jurisdiction against the Sultan, could not have any against the bank, but might the same decision not have been reached on the

[69] (1944) 324 U.S. 30.
[70] [1920] P. 30.
[71] [1938] A.C. 485.
[72] [1924] P. 236.
[73] [1938] A.C. 485 at 517.
[74] [1955] A.C. 72. The same conclusion was reached by Jenkins, J., in *Dollfus Mieg et Compagnie S.A.* v. *Bank of England* [1949] Ch. 369.
[74a] [1955] A.C. 72 at 89–90.
[75] (1877) 5 Ch.D. 605; cf. *Macbeath* v. *Haldimand* (1786) 1 T.R. 172; see Hanbury, *Principles of Agency*, p. 152 *et seq.*
[76] (1863) 1 H. and M. 505.

footing that the plaintiffs had no proprietary, but only a contractual, right, which they could not enforce against a third party?[77] But a principal cannot be deprived of his right of action against his agent merely because in a transaction he acted on behalf of a foreign sovereign as well. So in *Gladstone* v. *Musurus Bey*[78] securities were deposited by the plaintiffs in the Bank of England in the name of the Turkish ambassador, to secure performance of a contract between the plaintiffs and the Turkish Government. The ambassador threatened to withdraw the deposit, alleging breach of contract by the plaintiffs; it was held that though the ambassador could not be sued,[79] an interim injunction might be granted against the bank to restrain them from parting with the fund, under which they must refuse to honour any cheque drawn by the ambassador for the amount.

The protection of an alienee from a foreign sovereign may be required to prevent the embarrassment of that sovereign himself. In *The Tervaete*[80] it was held that a ship of a foreign sovereign which has been involved in a collision and then sold into private ownership cannot be liable to arrest in an action *in rem*. Scientifically it may be put that as a maritime lien could not attach to the sovereign, it can have no root as against his alienee. But the practical consideration is that a decision in the opposite sense would depreciate the price of ships owned by sovereigns which had had the misfortune to be involved in a collision. The case of *U.S.A. and Republic of France* v. *Dollfus Mieg*[81] bristles with points of the highest interest and greatest difficulty, but the point that is relevant here is that the doctrine of immunity was extended to a claim to recover property in the hands, not of an alienee, but of a mere bailee from a foreign sovereign. The bald statement of this extension indicates a striking reaction from the tendency to limit the application of the doctrine, so apparent in the judgment of Viscount Simon, the ink of which was hardly dry, in *Sultan of Johore* v. *Abubakar Tunku Aris Bendahar*[82]; but it may perhaps be firmly grounded on the consideration that a denial of immunity to the bailee might lead to an indirect

[77] Cf. *Hill* v. *Tupper* (1863) 2 H. and C. 121.
[78] (1862) 1 H. and M. 495.
[79] See generally, Holland, *Current Legal Problems*, Vol. 4, p. 81.
[80] [1922] P. 197.
[81] [1952] A.C. 582.
[82] [1952] A.C. 318 at 343.

impleading of the foreign sovereign, for the payment of damages for conversion by the bailee would vest in him the title to the property, so that he could set it up against his bailor, the foreign sovereign.

### EXCEPTIONS TO THE RULE OF IMMUNITY

Some emphasis was laid, in *De Haber* v. *Queen of Portugal,*[83] on the fact that the property was owned by the Queen in her public capacity. This was misplaced, in so far as it suggests a difference, for purposes of immunity, between public property of the State and private property of the sovereign. But it is interesting in that it foreshadowed the problem of ownership of real estate, often confidently stated, but never judicially declared, as an exception to the rule of immunity. Land, if a genuine, must be an isolated exception,[84] for in *Vavasseur* v. *Krupp*[85] the intervention as defendant of the Mikado of Japan rendered abortive an injunction obtained by a patentee of shells against Japanese agents who had bought them in Germany, and proposed to remove them from England on a Japanese warship. The reiteration of the principle that our courts may determine the title to land, even against a foreign sovereign, is certainly striking. A statement to this effect was thrown off, almost casually, by Lord Campbell in *Magdalena S.N. Co.* v. *Martin,*[86] this case, however, involved not sovereign, but diplomatic, immunity, which, though often confused with it, must, it is submitted, be governed by widely different considerations. The first positive and confident statement was made by Sir Robert Phillimore in *The Charkieh,*[87] who said, 'exemption from suit is admitted not to apply to immovable property'. Miss Allen treats the exception

[83] (1851) 17 Q.B. 171 at 196.

[84] Heffter, *Le Droit International de l'Europe,* p. 103, writes, 'pour l'acquisition d'immeubles situés [en pays étranger], la personne exempte doit se conformer aux dispositions des lois locales' (citing Bynkershoek, *de foro legatorum,* Chap. 16); see also Phillimore, *International Law,* Vol. 2, p. 136. But Marshall, C.J., in *The Schooner Exchange* v. *McFadden* (1812) 7 Cranch 116 at 145, suggested that a waiver of immunity may be automatically brought about by the acquisition of *any* property in the country.

[85] (1878) 9 Ch.D. 351. The patentee could not insist on destruction of the shells, or removal of the infringing features; the headnote should be lengthened by one word in order to make it clear that the Mikado could remove the shells *intact.*

[86] (1859) 2 E. & E. 94; see Holland, 4 *Current Legal Problems,* p. 81.

[87] (1873) L.R. 4 A. and E. 59 at 97.

as axiomatic,[88] and Lauterpacht as eminently reasonable,[89] though he is forced to admit that there is no precise English authority upon the point. The problem was exhaustively discussed in *Sultan of Johore* v. *Abubakar Tunku Aris Bendahar,*[90] but was not resolved, as the decision eventually turned on the waiver by the Sultan of immunity.[91] Even if we could follow Phillimore in his statement of principle, we must look askance at the reason he assigns for it, that ownership of land within the court's jurisdiction is tantamount to waiver of immunity. It is tentatively suggested that it might be more rational to invoke, for this purpose, the feudal relation which the legislation of 1925 has not destroyed; a foreign sovereign who is tenant in fee simple of land in England must be regarded as tenant-in-chief of the Queen, and so subject in respect of his holding to the jurisdiction of her courts. But the exception, if established, may prove to be fraught with many practical difficulties. How if the Minister of Housing and Local Government makes an order that an area of land shall be developed as a new town under the Act of 1946, and an objection is lodged by the Ruritanian ambassador, on the ground that a piece of land in the heart of the area is the private property of King Rudolf?

I have ventured to suggest that a revulsion of feeling is manifesting itself in high judicial pronouncements against the undue expansion of the doctrine of immunity.[92] It is entirely consistent with this trend of thought that there should be an anxiety to preserve the memory of *Morgan* v. *Larivière,*[93] where the House of Lords, though unable to imply from the transactions of the parties the existence of a trust, yet were firmly of opinion that, had such a trust been shown, the Court might administer the funds lodged in an English bank, notwithstanding that a foreign sovereign was interested in them, and might not think fit to come before the court in a suit relating to them.

The third and most important exception relates to a

[88] *Op. cit.,* p. 301.
[89] *Op. cit.,* p. 244.
[90] [1952] A.C. 318.
[91] *Post,* pp. 15–16.
[92] See *per* Viscount Simon in *Sultan of Johore* v. *Abubakar Tunku Aris Bendahar* [1952] A.C. 318 at 343; but it is possible that it has been temporarily checked by *U.S.A. and Republic of France* v. *Dollfus Mieg* [1952] A.C. 582; *ante,* p. 12. Judge Lauterpacht is decidedly in favour of its drastic curtailment—(1951) *B.Y.I.L.,* p. 220 *et seq.*
[93] (1872) L.R. 7 Ch. 550; (1875) L.R. 7 H.L. 423.

sovereign's waiver of his immunity. As early as 1843, in *Ex-Duke of Brunswick* v. *King of Hanover,*[94] it was conceded that a foreign sovereign may by his actions be taken to have submitted to the jurisdiction of the Court, so that the case may be tried on its merits. But such actions must be quite unequivocal, and the mere appearance of the defendant to the bill was not of that character. Nor would a mere agreement to waive immunity. Nor does the fact of residing incognito,[95] nor of trading.[96] Further, though immunity, once waived, cannot be resumed, it can be held in reserve, and used effectively at a late stage in the proceedings. It is difficult to usé neutral language about the conduct of the defendant in *Duff Development Co.* v. *Government of Kelantan.*[97] 'Put not your trust in princes' might be a fitting text. The defendants's agreement with the plaintiff company contained an arbitration clause; a dispute was duly referred to an arbitrator, who made an award in favour of the company. The Kelantan Government then applied to the Chancery Division to set aside the award, on the ground not of its sovereignty, but of error in law. The application having been refused, and the decision affirmed by the Court of Appeal and the House of Lords,[98] the company obtained from the King's Bench Division, under section 12 of the Arbitration Act, 1889, an order giving leave to enforce the award. Then at long last the Government played the card of sovereign immunity, which turned out to be an ace of trumps. Waiver of immunity could not be spelled out of either the assent to the arbitration clause or the application to the court to set aside the award. The effect of this case, reinforced by *Kahan* v. *Pakistan Federation,*[99] is that nothing short of an irrevocable act of repudiation, 'actual submission before the court itself', in the words of Jenkins, L.J.,[1] is sufficient to ensure jurisdiction to the court. But a foreign sovereign may find himself caught in his own toils. It was on the point of waiver that *Sultan of Johore* v. *Abubakar Tunku Aris*

[94] (1843) 6 Beav. 1; (1848) 2 H.L.C. 1.
[95] *Mighell* v. *Sultan of Johore* [1894] 1 Q.B. 149.
[96] *Compania Mercantil Argentina* v. *U.S. Shipping Board* (1924) 131 L.T. 388.
[97] [1924] A.C. 797.
[98] [1923] A.C. 395.
[99] [1951] 2 K.B. 1003. In *Ex p. Republic of Peru* (1942) 31 U.S. 578, it was laid down that a claim to sovereign immunity is not waived by reserving a right to interpose other defences.
[1] [1951] 2 K.B. 1003 at 1016.

*Bendahar*[2] went off. The Sultan had himself started the proceedings to establish his title to certain land in Singapore, by obtaining from a Japanese court in June, 1945, a judgment that he was the sole beneficial owner of it. After the Japanese occupation had ended, his son and others took out an originating summons under an ordinance of 1946, applying to set aside this judgment. The plea of immunity at this stage was of no effect, for the Sultan, by setting the law in motion on his own behalf, had invited against himself all defences that could be made against a private individual, including the right to appeal against a judgment recorded in his favour. He could succeed only if he could show that the originating summons was in the nature of a new proceeding by the defendants. But Viscount Simon regarded it in the light of a continuation of the proceedings instituted by him in the Japanese Court. He had waived his immunity, and could not go back on his waiver.

This case brings us to the more general discussion of the position of the foreign sovereign as plaintiff. In this character, he presents far less difference from a private individual than is the case with him in the character of defendant. To one inhibition he is subject by which a private individual could not be prejudiced. It is a strict rule that our courts will not protect the political privileges of a foreign sovereign,[3] nor enforce a foreign revenue or penal law.[4] In *Folliott* v. *Ogden*[5] the fact that the plaintiff had been attainted by New York State, the defendant by New Jersey State, could not prevent the plaintiff from suing the defendant on a bond in England. In *Re Visser*[6] the Court refused to entertain an action by the Queen of the Netherlands to enforce a revenue claim against one of her own subjects in England, and in *Re Delhi Supply Co.*[7] this principle was applied where the claimant was the Government of India,

[2] [1952] A.C. 318.
[3] *Emperor of Austria* v. *Day and Kossuth* (1861) 3 De G.F. and J. 217; see Moore, *Act of State in English Law*, p. 28; Hanbury, *Modern Equity*, 6th ed., p. 650.
[4] See Dicey, *Conflict of Laws*, 6th ed., p. 152; Cheshire, *Private International Law*, 4th ed., p. 133. In *Barclay* v. *Russell* (1797) 3 Ves. 423 at 429, Lord Loughborough said, 'No nation executes the criminal judgments of another'.
[5] (1789) 1 H. Bl. 123.
[6] [1928] Ch. 877.
[7] [1954] Ch. 131; [1955] 1 All E.R. 292 (*sub. nom. Government of India* v. *Taylor*.

a State adhering to the Commonwealth. In *Banco de Vizcaya* v. *Don Alfonso De Borbon y Austria*[8] the Revolutionary Spanish Government failed to recover, through its agent bank, securities of the ex-King of Spain deposited in an English bank, which it had purported to confiscate by decree, along with the rest of his property. Indeed, it appears from *Bank Voor Handel en Scheepvaart N.V.* v. *Slatford*[9] that our courts will not recognise any legislation of a foreign sovereign, confiscatory or otherwise,[10] as effective to transfer property in England. Such legislation is, of course, completely effective to transfer property situated in the sovereign's own territories.[11] In *Lynch* v. *Provisional Government of Paraguay*[12] the foreign sovereign was asking the Court to recognise the *retrospective* operation of a penal law. A domiciled Paraguayan died in Paraguay, leaving personal property in England. After his death, but before a grant of probate of his will had been made in England, a decree of the Government of Paraguay declared all the property of the deceased to be the property of the nation of Paraguay. It was held that though by the law of Paraguay as existing when probate was applied for, the will might be invalid, the right to the grant, and succession to the property, must be governed by the law of Paraguay obtaining at the time of the death, and so the Government of Paraguay could not now contest the validity of the will. The decision might be rested on the additional basis that though our courts will respect the dignity, they will not respect the lapses from dignity, or vagaries, of a foreign sovereign.

In *Re Visser*[13] the Queen of the Netherlands unsuccessfully invoked the aid of our courts for the recovery of revenue from a

[8] [1935] 1 K.B. 140; cf. *Barclay* v. *Russell* (1797) 3 Ves. 423 (*ante*, p. 3); *Frankfurter* v. *Exner* [1947] Ch. 629; *Novello* v. *Hinrichson Edition* [1951] Ch. 595 at 1026.

[9] [1953] 1 Q.B. 248.

[10] Disapproving *Lorentzen* v. *Lydden* [1942] 2 K.B. 242, wherein the distinction is made.

[11] *Luther* v. *Sagor* [1921] 3 K.B. 532; *Princess Paley Olga* v. *Weisz* [1929] 1 K.B. 718.

[12] (1871) L.R. 2 P. and M. 268. Where a foreign sovereign claims the personal estate in England of a person domiciled in his country, not through any legislation purporting to have exterritorial effect, but simply according to the laws of succession of that country, the Court will award that estate to him on the ordinary principle that succession to personalty is governed by the law of the domicile: *In the Estate of Maldonado* [1954] P. 223.

[13] [1928] Ch. 877.

Dutch subject, but in *Re Amand*[14] she received their help in securing the person of a deserter from her armed forces. Viscount Caldecote held that the Allied Forces Act, 1940, and an Order in Council made thereunder, authorised the arrest. Amand then sought to impeach the validity of the calling-up decree under Dutch law. The Dutch Defence Minister argued that English courts could not inquire into the validity of a decree of a Government, admittedly sovereign, dealing with its own national. It was held by a Divisional Court that it could investigate the matter, as the sovereign was resident in England, as was the national, and the Dutch courts were not at the time performing their functions. The Dutch decree was then examined on its merits, and found to be valid. From this decision no appeal could lie, as the case was in a 'criminal cause or matter' within section 31 (1) (*a*) of the Judicature Act, 1925; the matter, owing to the statutory provisions giving allied military authorities power over their own nationals in England, was just as if a writ of *habeas corpus* had been refused to a person charged as a deserter under section 154 (4) of the Army Act.

Apart from these cases, however, a foreign sovereign may use the process of English courts equally with any private litigant.[15] But if he does so, he lays himself open to, and invites, any defences which would be available against a private litigant, including the possibility of an appeal to reverse an original judgment in his favour.[16] It was indeed laid down in *U.S.A.* v. *Wagner*[17] that it is essential for a foreign sovereign, suing in a court of equity, to put forward some public officer as representing his interests, on whom process may be served, and who can be called upon to give discovery upon a cross bill. The situation is perhaps clearer if we look at it from the standpoint of the defendant. Oppenheim draws a distinction,[18] which foreshadows that made in *Sultan of Johore* v. *Abubakar Tunku Aris Bendahar,*[19] between defences to the instant action and the commencement of a new action. The former is always, the latter

[14] [1941] 2 K.B. 239; [1942] 1 K.B. 445; [1942] 2 K.B. 26; [1943] A.C. 147; see R. E. Megarry in 59 *L.Q.R.*, p. 110.
[15] *Hullet* v. *King of Spain* (1828) 1 Dow and Cl. 169.
[16] *Rothschild* v. *Queen of Portugal* (1839) 3 Y. and C. Ex. 594.
[17] (1867) L.R. 3 Eq. 724.
[18] *International Law*, 7th ed., Vol. 1, p. 239, para. 115a.
[19] [1952] A.C. 318 (*ante*, p. 16).

never, within his power. In *Prioleau* v. *U.S.*[20] the defendant was sued by the United States in an action concerning the property in some bales of cotton, shipped at Galveston and consigned for sale to him for the benefit of the Confederate Government; he was held entitled to discovery on oath concerning the subject-matter of the suit, and to file a cross-bill in order to get it. *The Newbattle*[21] carries the matter even further, through the judgment, *mirabile dictu,* of Brett, M.R. The defendant can insist that the foreign sovereign plaintiff in an action for damage caused by collision, whose ship cannot, because of his status, be arrested, shall give security for damages. But he cannot, under cover of defence to the action, make what is substantially an independent claim. Thus in *U.S.S.R.* v. *Belaieff*,[22] the Soviet Government sued to recover documents from the president of the board of trustees for the previous Provisional Government of Kerensky. He did not dispute the title of the plaintiff, but claimed a lien on the documents until he should receive indemnity for certain other actions pending with regard to the documents. It was held that his counterclaim could be entertained only in so far as it corresponded with matters immediately connected with the instant claim. The case is a modern affirmation of the principle enunciated by Lord Langdale in *Ex-Duke of Brunswick* v. *King of Hanover*,[23] that by suing in our courts on one matter, a foreign sovereign cannot be taken to have rendered himself liable to be made a defendant on quite a different matter.

### THE BASES ON WHICH THE IMMUNITY RESTS

The doctrine is not the first, nor will it be the last, to grow up without any one clear-cut reason. At least seven bases have been from time to time suggested.

1. *The necessity for collaboration between executive and judiciary.* It is a corollary of the fundamental principle that neither should encroach on the sphere of the other that each should, so far as that sphere extends, render every aid and accommodation. But a note of caution was sounded by the

[20] (1866) L.R. 2 Eq. 659.
[21] (1885) 10 C.P.D. 33.
[22] (1925) 42 T.L.R. 21; cf. *U.S.A.* v. *McRae* (1869) L.R. 8 Eq. 69; *Strousberg* v. *Republic of Costa Rica* (1881) 44 L.T. 199.
[23] (1843) 6 Beav. 1 at 38, cited by North, J., in *South African Republic* v. *La Compagnie Franco-Belge du Chemin de Fer du Nord* (1898) 1 Ch. 190 at 195.

United States Supreme Court in *Republic of Mexico* v. *Hoffman*.[24] Where the Department of State had refrained from certifying that it recognises state ownership without possession of a ship as a ground for immunity, it would merely embarrass the executive were the judiciary to grant it.

2. *Exterritoriality.* Hall complained that this explanation 'has been transformed from a metaphor into a legal fact'.[25] But it is submitted that it has never been allowed to become dangerous, for it has never been pushed to its full logical effects. The Court of Appeal rejected it, at any rate inferentially, as a sound base, in *The Parlement Belge*.[26] It was decisively repudiated by the Judicial Committee in *Chung Chi Cheung* v. *R.*,[27] where Lord Atkin unhesitatingly disapproved the description by Oppenheim of warships as 'floating portions of their flag-State'.[28] But at no time did the theory of exterritoriality hold unchallenged sway. Lord Langdale in *Ex-Duke of Brunswick* v. *King of Hanover*[29] went out of his way to point out that if it were taken to its legitimate consequences, a foreign sovereign might be a dangerous guest. It might, had she still been Queen, have justified the action of Christina of Sweden in executing Monaldeschi during her residence in France.[30] Any possible doubts as to the extent of the authority of foreign sovereigns resident in England during the war were dispelled in advance by the Allied Forces Act, 1940, under which the Dutch authorities acted in *Re Amand*.[31]

3. *Reciprocity.* This is of course a most obvious and practical explanation, and has played a notable part in many fields,

[24] (1944) 324 U.S. 30.
[25] *International Law,* 8th ed., p. 216.
[26] (1880) 5 P.D. 197.
[27] [1939] A.C. 160.
[28] *International Law,* 5th ed., Vol. 1, para. 450. The description is retained in the 7th edition, the decision in *Chung Chi Cheung* v. *R.,* that English courts had jurisdiction in respect of a crime committed on board a Chinese cruiser, being explained on the basis of waiver, the Chinese authorities having permitted members of the crew to give evidence in aid of the prosecution.
[29] (1843) 6 Beav. 1.
[30] Vattel reminds us that her action was doubly improper, in that she was no longer a sovereign having abdicated in 1654 in favour of Charles X; Svanstrom and Palmstierna, *History of Sweden,* pp. 144–152. See Bynkershoek, *De foro legatorum,* ed. Scott, Carnegie Endowment, p. 20, n. 2.
[31] [1941] 2 K.B. 239; [1942] 1 K.B. 445; [1942] 2 K.B. 26; [1943] A.C. 147; *ante,* p. 18.

especially in that of international copyright.[32] But the only case, among all those discussed in this paper, in which much notice was taken of it, is *Krajina* v. *Tass Agency*,[33] where Cohen, L.J., went so far as to suggest that a foreign sovereign might be regarded as divisible, in the sense that even the conferment on one of his organs of juridical status would not necessarily divest that organ of sovereign immunity. Judge Lauterpacht, besides condemning it as conducing to uncertainty, applied to it a modern version of 'Cardinal Morton's fork'. If the principle of immunity is sound, it should be applied without regard to reciprocity; if it is indeed becoming increasingly unsound, none of the advantages of reciprocity can be relied upon to justify its retention.[34]

4. *Analogy to diplomatic immunity.* This analogy, though persistently drawn, is, it is submitted, palpably false. Lord Maugham mars the excellence of his speech in *The Cristina*[35] by his facile assumption that the Act of 1708, which restated and regulated the common law as to the privilege of ambassadors, applied also to sovereigns, whereas a reader will ransack the Act in vain for any allusion to the latter.[36] The seeds of the confusion were probably sown in 1721, when Cornelius van Bynkershoek published *De foro legatorum.* Phillimore in *The Charkieh*,[37] that storehouse of profound learning and of doubtful propositions, tells us that 'the law as to the privilege of an ambassador applies with equal force to the sovereign', citing Bynkershoek's maxim, '*major non est sanctitas mandatarii quam mandantis, si res suas ipse velit agere*'.[38] The confusion is not wholly absent even from the judgment of Marshall, C.J., in *The Schooner Exchange* v. *M'Fadden*.[39] It did not exist in the mind of Blackstone, who, though he makes no mention of foreign sovereigns, gives us a brief but characteristically lucid

[32] Copyright Act, 1911, s. 29. See Ivamy, 6 *Current Legal Problems*, p. 196, at p. 212.
[33] [1949] 2 All E.R. 274.
[34] (1951) *B.Y.I.L.*, p. 220, at p. 246.
[35] [1938] A.C. 485 at 513.
[36] Vattel (*Law of Nations*, 1793 ed., p. 440) records that 'Peter the Great, when he went into foreign countries in quest of the arts and sciences, for enriching his empire, used to put himselt among the retinue of his ambassadors'.
[37] (1873) L.R. 4 A. and E. 59 at 91.
[38] *Op. cit.*, Chap. 3.
[39] (1812) 7 Cranch 116.

account of diplomatic privilege.[40] But the conclusion that the analogy must be regarded as due to confused reasoning inevitably follows from a comparison of functions. Of course it may be said with some force, even in modern times, when states are not so sensitive to trivial slights, nor so eager to resent them, that the violation of the person of an ambassador is an insult to the sovereign who sent him, but the real and practical reason for his immunity from the jurisdiction of territorial courts is surely that without it he would not be able efficiently to perform the functions, which are the whole *raison d'être* of his continuous residence. No such considerations can, however, apply to the case of a foreign sovereign, whose visits, whether for state or for private purposes, are short.

5. *International Comity.* This is an explanation which is satisfying rather than satisfactory. The objections to its vagueness and uncertainty are too obvious to need elaboration. Taken, however, in conjunction with other forces, it has undoubtedly exercised a powerful influence in the development of the doctrine of immunity.

6. *Analogy to immunity of domestic sovereign.* Judge Lauterpacht writes, 'it is probable that, as in the United States, so in Great Britain, the somewhat rigid application of the doctrine of the absolute immunity of foreign governments was not uninfluenced by the immunity of the Crown'.[41] To Alexander Hamilton, the doctrine of sovereign immunity was axiomatic; he wrote, 'it is inherent in the nature of sovereignty, not to be amenable to the suit of an individual without its consent'.[42] The decision in *Chisholm* v. *Georgia,*[43] upholding an action against a State, led to discontent which was allayed by the Eleventh Amendment to the Constitution,[44] which provides that 'the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State'. Holmes, J., in two cases went so far as to express the doctrine in terms which have been denounced as totalitarian![45] In *Monaco* v.

[40] *Commentaries,* Vol. 4, p. 70.
[41] *Op. cit.,* p. 234.
[42] *The Federalist,* No. 81 (ed. Beloff), p. 416.
[43] (1793) 2 Dallas 419; see Warren, *The Supreme Court in United States History,* Vol. 1, pp. 93–102.
[44] Burdick, *Law of the American Constitution,* p. 93.
[45] *Kawanakoa* v. *Polyblank* (1906) 205 U.S. 349; *The Western Maid* (1921) 257 U.S. 419; see Lauterpacht, *op. cit.,* p. 232, n. 3.

*Mississippi*[46] a State was sued by a foreign sovereign. The Eleventh Amendment makes no mention of such a plaintiff, but only of his citizens. But the sanctity of the federal balance won a signal victory over the jargon of international comity. The Supreme Court simply read into Article III, section 2 of the Constitution, which gives the Court jurisdiction over suits by a foreign sovereign against a State, the necessity for that State's consent. But in England the theory that the King can do no wrong, though productive of much uneven justice, had little in common with highflown notions of state inviolability. It was never indiscriminate in its application, and has now been almost expunged by the Crown Proceedings Act, 1947. No longer can we base the immunity from salvage claims of a foreign public ship on any similar immunity of ships under requisition by our own sovereign, for section 8 of the Act makes express provision for such claims.[47]

7. *Sovereign dignity.* This, in the rational sophistication of modern times, has only to be mentioned to be dismissed. In *Vavasseur* v. *Krupp*[48] James, L.J., outdid even Brett, L.J., in expressions of fulsome reverence. His description of the action by a patentee to restrain the infringement of his patent by an agent of a foreign sovereign as 'one of the boldest ever made in an English Court' can excite in us no sentiment but amazement that such words could be seriously uttered from the Bench. But even more strangely rings the answer of Lord Lyndhurst, in *Hullet* v. *King of Spain,*[49] to a request for costs for a sovereign who had won his suit, 'we will not disparage the dignity of the King of Spain by giving him costs'. Costs were, however, given in *Monaco* v. *Monaco*[50]; the plaintiff, in accepting them, could say, with Pooh Bah, 'it revolts me, but I do it'.

A new basis for the immunity must be found, and indeed the time has come for a drastic overhaul of the entire doctrine, many aspects of which are completely out of date.

[46] (1933) 292 U.S. 313.
[47] It is submitted that *The Broadmayne* [1916] P. 64 is no longer law as to the main point of the decision, but may be taken as authority that there exists a prerogative power, independently of Parliamentary sanction, to requisition ships in time of emergency; see Keir and Lawson, *Cases in Constitutional Law* (4th ed. 1954), p. 74.
[48] (1878) 9 Ch.D. 351.
[49] (1828) 1 Dow and Cl. 169.
[50] (1937) 15 L.T. 231.

# 2

# NATURAL JUSTICE IN ENGLISH LAW

G. W. Keeton

In the recent case of *Semtex* v. *Gladstone*,[1] Finnemore, J., remarked—'I hope the law of this country and natural justice will approximate always as closely as possible but all claims and legal defences have to be grounded in law, and not according to somebody's idea of natural justice, not even that of the judge who may hear the case'.[2]

In the context of that case the reminder was a useful one, for the report shows that an attempt had been made to suggest that although an employee had been found liable for causing damage to a third party, it was contrary to the principles of natural justice that he should make any contribution to the damages awarded. As Finnemore, J., pointed out, such a principle was unacceptable, and he added[3]—

'I find that justice, as we conceive justice in these courts, says that the person who caused the damage is the person who must in law be called upon to pay damages resulting therefrom'.

These observations are a distinct echo (perhaps unconscious) of the remark of Lord Sumner in *Sinclair* v. *Brougham*[4] that 'there is now no ground left for suggesting as a recognisable "equity" the right to recover money *in personam* merely because it would be the right and fair thing that it should be refunded to the payer'.

Natural justice is, in fact, potentially a revolutionary concept, if given wide scope within a legal system. It would overturn, or at best re-write, existing rules of legal liability. It would permit the reopening of disputes closed by judicial decisions. It would open, on the broadest possible front, the controversy upon the question, What is fair play? Is there any generally accepted criterion of it? If not, what alternative have we to the position

[1] [1954] 1 W.L.R. 945.
[2] Reported, *Current Law*, June, 1954, § 192.
[3] [1954] 1 W.L.R. 945 at 953.
[4] [1914] A.C. 398 at 456.

that fair play is what the judge trying the case says it is? After all, we have Selden's authority for the proposition that Equity (the product of an earlier conception of natural justice) varied as the length of the Chancellor's foot, until the post-Restoration Chancellors, influenced by the development of the doctrines of judicial precedent in the Common Law Courts, systematised it by importing that doctrine into Equity.

Accordingly, although as Allen shows in *Law in the Making*,[5] natural justice has historically played an important part in moulding English law (both Common Law and Equity) and although it has a place in modern law, that place is a modest one. Like public policy, it may be an unruly horse, and the courts have usually shown anxiety until it has been bitted and bridled.

### NATURAL JUSTICE AND FOREIGN JUDGMENTS

One interesting field where this process may be studied is in the conflict of laws, where it has long been settled law that a foreign judgment which offends the principles of natural justice will not be enforced by the English courts. Such a principle, if broadly interpreted, would open the door to the reconsideration of wide classes of foreign judgments, for a variety of reasons. In fact, however, a foreign judgment will not be invalidated by an English court simply because that court considers the foreign judgment to be unjust, either in the abstract, or in relation to the principles of English law. One illustration of this is the case of *Scarpetta* v. *Lowenfeld*,[6] where it was held that the judgment of a foreign court was not opposed to natural justice because the foreign court had declined to admit evidence of a party which would be admissible by an English court. Nor is it open to contend in an English court that the foreign judgment is incorrect from the standpoint of the foreign law. As Channell, J., said in *Robinson* v. *Fenner*[7]—

'Whatever the expression "contrary to natural justice", which is used in so many cases, means (and there really is very little authority indeed as to what it does mean), I think it is not enough to say that a decision is very wrong, any more than it is

[5] (5th ed. 1951), p. 285.
[6] (1911) 27 L.T. 509.
[7] [1913] 3 K.B. 835 at 842.

merely to say that it is wrong. It is not enough, therefore, to say that the result works injustice in the particular case, because a wrong decision always does'.

It may be true, as Channell, J., says, that few English judges have attempted a general definition of natural justice in this context. They have, however, been ready to emphasise that its significance is primarily procedural. It is concerned exclusively with the question whether either party has had full opportunity to present his case, and has received proper notice of the steps taken by his opponent. As Hamilton, L.J., pointed out in his admirable judgment in *Arlidge's Case*[8] in the Court of Appeal, formerly the Courts tended to take a bolder view. At one time, natural justice 'was regarded as setting up for foreign jurisdictions a standard of judicial correctness upon the pattern of our own common law courts',[9] and he illustrates this by reference to the decision of Lord Ellenborough in *Buchanan* v. *Rucker*[10] where, however, the ground of invalidity of a colonial judgment was the practice of summoning a defendant who had never been within the jurisdiction by nailing the writ on the door of the court-house. Whatever might be the position at the beginning of the nineteenth century, however, Baron Bramwell's opinion in *Crawley* v. *Isaacs*[11] in 1867 was that 'the term "natural justice" which has been used in reference to foreign judgments refers rather to the form of procedure than to the merits of the particular case. . . . If the proceedings be in accordance with the practice of the foreign Court, but that practice is not in accordance with natural justice, this Court will not allow itself to be concluded by them'.

Six years later Mellish, L.J., was even more explicit. He said—

'It was always held that a foreign judgment could be impeached at law as contrary to the principles of natural justice, as, for instance, on the ground of the defendant having had no notice of the foreign action, or not having been summoned, or of want of jurisdiction, or that the judgment was fraudulently obtained'.[12]

[8] [1914] 1 K.B. 160 at 199 *et seq.*
[9] *Ibid.*, at p. 199.
[10] (1807) 1 Camp. 63.
[11] (1867) 16 L.T. 529 at 531.
[12] *Ochsenbein* v. *Papelie* (1873) L.R. 8 Ch. 695 at 700.

The modern cases are simply illustrations of the very restricted orbit of natural justice, and the latest edition of Dicey observes that 'there would appear to be no case where the defence of denial of natural justice has been successfully raised upon the basis of anything other than absence of notice of the proceedings or inadequate opportunity to plead'.[13] Even proceedings obviously tainted with unfairness will not be regarded as invalid, provided these two conditions have been observed and even absence of notice may not be decisive if the foreign law makes it unnecessary. Amongst the older cases illustrative of this is *Messina* v. *Petrococchino*.[14] In this case the Privy Council, in an appeal from the Court of Appeal at Malta, held that a judgment of the Greek Royal Commercial Chancery at Constantinople was not impeachable on the ground of natural justice, although the Greek Court, without communication or any attempt at communication with the cargo owner at Malta, had appointed a stranger to be curator of the cargo, when the vessel was disabled from proceeding to Malta, and had further directed the curator to borrow money on the security of a bottomry bond, as payment for the cost of trans-shipping and forwarding the cargo to Malta. Here, it will be seen, the Greek Court had in fact decided important matters of law between the parties without giving the cargo owner an opportunity to appear, but since this was in accordance with the procedure of a competent court, the Privy Council declined to interfere.

A more recent, and probably better known illustration of the same point is *Jacobson* v. *Frachon*.[15] In that case A, a London firm, contracted to buy silk from B, a Lyons firm. A brought an action in a Lyons court for cancellation of the contract, and damages, alleging that the deliveries were short, and the material of inferior quality. The Lyons court appointed as expert to examine the material in London a person who was a relative of B. This person made no proper examination, and refused to hear the evidence of A and their witnesses. The result was that A's action failed, and Roche, J., in the English Court, found that the expert's report was biased. When, however, A brought an action against B in an English court, B pleaded the

[13] *Conflict of Laws* (6th ed. 1949), p. 397. Cheshire's view is similar. *Private International Law* (4th ed. 1952), pp. 818–821.
[14] (1872) L.R. 4 P.C. 144.
[15] (1928) 138 L.T.R. 386.

French judgment, and the Court of Appeal held that the French judgment could not be said to be contrary to natural justice, since the requirements of French procedure had been observed, and A had not been prevented from presenting their case in the French court.

On the other hand, the English courts have shown themselves alert to the necessity for the parties to receive adequate notice of judicial proceedings affecting them, since they regard the maxim *audi alteram partem* as a principle common to the law of all civilised nations. The form of notice required is such as will comply with the requisites of the foreign system, but if the foreign system dispenses entirely with notice, the English court may inquire whether the requirements of natural justice have been satisfied. In *Rudd* v. *Rudd*,[16] Horridge, J., refused to recognise an American decree of divorce, which had been instituted by a husband, where the petition had never been served on the wife, nor had proper steps been taken to bring the proceedings to the wife's notice.[17] Where, however, the defendant expressly or by implication agrees to dispense with notice, he cannot subsequently upset the foreign judgment in England on this ground.

It will therefore appear that 'natural justice' is not to-day (whatever it may once have been) a ground for attacking the quality of justice meted out by foreign courts. It takes cognisance only of want of jurisdiction or failure to comply with procedural requirements. It is easy to see, however, that such an attitude does not necessarily dispose of all difficulties. It may well be, especially in the present state of international tension, that although the forms of procedure of the foreign legal system have been scrupulously followed, they have been used in such a way as to bring about, in substance, a denial of justice. If such should be the case, the English Conflict of Laws would appear to be powerless to assist the sufferer. He must then rely upon the somewhat ponderous machinery of international law, and

[16] [1924] P. 72.

[17] Cf. *Igra* v. *Igra* [1951] P. 404: the Court refused to invalidate a German decree of divorce, where the proceedings were probably coloured by racial bias, and where no notice had been served on the respondent husband, because German law had provided that decrees obtained in these circumstances were valid. Pearce, J., said in this case: 'As there is a discretion in our own Court to dispense with service, we should be slow to brand a foreign decree as contrary to natural justice (particularly when it was made in time of war) merely because notice did not in fact reach the applicant'.

through the intervention of his foreign office, he must seek redress for a denial of justice. Here again, however, the redress available is by no means complete, for, as the Arbitrators in the *Salem Case* in 1932 (under the Mexican-United States General Claims Commission) pointed out: 'International law has from the beginning conceived under the notion of "denial of justice" forming this basis of political claims only exorbitant cases of judicial injustice. Absolute denial of justice; inexcusable delay of proceedings; obvious discrimination of foreigners against natives; palpable and malicious iniquity of a judgment—these are the cases which, one after another, have been included under the notion of "denial of justice"'.[18]

A good many cases of extreme hardship may nevertheless slip unredressed through the broad meshes of this sieve.

### NATURAL JUSTICE AND ADMINISTRATIVE TRIBUNALS

It has been thought useful to begin this discussion of 'natural justice' in English law with an exposition of the position in the English Conflict of Laws because it supplies valuable clues to the treatment of this principle in other branches of English law. Indeed, the acute mind of Hamilton, L.J. (later Lord Sumner), in his judgment in *Arlidge's Case* (in the Court of Appeal) pointed out that the ideas underlying the concept were the same, whether what was being considered was the judgment of a foreign court or the proceedings of an administrative tribunal. In considering whether the proceedings of domestic and administrative tribunals may be considered to be in accordance with the principles of natural justice, the courts have been concerned, not so much with what has been decided, as with the observance of certain necessary forms on the part of a tribunal, in order to ensure (as far as procedure can do) that the Court is in a position to decide with an unfettered mind. That the Court is not concerned with abstract justice but with forms appears very clearly from the decision of the Divisional Court in *R.* v. *Brighton Rent Tribunal*.[19] In that case a rent tribunal set up under the Landlord and Tenant (Rent Control) Act, 1949, had decided upon the reduction of rents, not upon evidence put before them, but upon

[18] Schwarzenberger, *International Law as Applied by International Courts*, 2nd ed., 1949, p. 240.

[19] [1950] 2 K.B. 410.

their own personal knowledge, the result being that the rents had been reduced to figures constituting a hardship to the landlord having regard to the price paid for the property, the cost of repairs and similar matters. For the landlords, it was strongly urged that the procedure followed by the tribunal was in conflict with the principles of natural justice, and therefore the King's Bench had power to control them by certiorari or mandamus. To this the Attorney-General, Sir Hartley Shawcross, replied that the term 'natural justice' had little value in law. The Divisional Court held that the procedure followed by the tribunal was within the wide terms of the Act of 1949, and therefore the Divisional Court had no power to interfere. Lord Goddard, C.J., observed [20]—

'The real complaint made here is that the tribunal, it is alleged, disregarded what are called the principles of natural justice', but he goes on to point out that the requirements of the Act of 1949 had been satisfied, even though the result was to permit rent tribunals to dispense with many things which are considered essential in the proceedings of a court of justice; and he continues—

'That these proceedings have not been conducted in a way which would be tolerated in an ordinary court of law there is no doubt; but the ordinary courts of law are not governed by statutes like this of 1949, which permits these tribunals to act on their own knowledge and without any evidence. Here . . . the formalities prescribed by the Act were observed'.[21]

The result was that the landlords were remediless. When a statute dispenses with the need for incidents of procedure which are usually considered to be the hall-marks of 'natural justice', the Courts will not write such requirements into the Act. This is, of course, only another way of saying that the Court cannot hold an Act of Parliament void. Coke, in his Institutes, suggested that a Statute which violated the principles of natural justice could be held to be of no effect, but such a doctrine was obsolete even in his day. If, therefore, Parliament chooses to confer on administrative courts powers to dispense with procedural safeguards, which have been regarded as the hall-marks of natural justice, and which the ordinary courts themselves have

[20] [1950] 2 K.B. 417.
[21] *Ibid.*, at p. 421.

regarded as essentials in their own procedure, there is nothing which the ordinary courts can do to restore those safeguards.

There is, however, nothing novel in this decision, for the situation had been made clear thirty-five years before in the classic case of *Local Government Board* v. *Arlidge*,[22] to which reference has already been made, and it is valuable to compare and contrast the views of the Court of Appeal and the House of Lords on this question. Arlidge was a sufferer under various closing orders of the old Local Government Board in respect of several houses in Hampstead owned by him. The Board had acted under the Housing and Town Planning Act, 1909, section 39 (1), which empowered the Board to make rules governing its procedure in respect of appeals from such orders. The procedure it had established was contained in the Local Government Board Rules, which had been complied with in this case. One condition specified in the section was that a public local inquiry should first be held. Such an inquiry was held in this case, by an inspector appointed by the Board. The inspector made his report to the Board, but neither the nature nor the contents of the report was disclosed to Arlidge, who thereupon applied to the Divisional Court for a writ of certiorari to bring up and quash the orders. It was argued on behalf of Arlidge that the procedure followed by the Board violated the principles of natural justice in three respects: (1) he was not informed what was the composition of the appellate body of the Board which decided his case; (2) he had not been allowed to present his case orally to the tribunal (although it should be noticed that the Board gave him the opportunity to make further representations in writing, of which he did not avail himself); (3) knowledge of the nature and contents of the inspector's report (obviously the key-point of the inquiry) was denied to him.

The conflict of judicial opinion upon this question is interesting. The Divisional Court (Ridley, Coleridge and Bankes, JJ.) held that the appeal had been properly conducted, since it conformed to the Act and the Rules.[23] There was therefore nothing contrary to natural justice in the Board's procedure. The Court of Appeal by a majority reversed this decision,[24] Vaughan

[22] [1913] 1 K.B. 463; [1914] 1 K.B. 160; [1915] A.C. 120.
[23] [1913] 1 K.B. 463.
[24] [1914] 1 K.B. 160.

Williams and Buckley, L.JJ., being of the opinion that the requirements of natural justice had not been satisfied, whilst Hamilton, L.J., thought that natural justice was 'an expression sadly lacking in precision',[25] and that its requirements could not be written into a procedure which conformed with the Act and the Rules. All four members of the House of Lords (Lord Haldane, L.C., and Lords Shaw, Moulton and Parmoor) agreed with Hamilton, L.J. Even so, this weight of judicial opinion is a little surprising. There was weighty authority in 1915 to support the contention of Arlidge's counsel that 'as soon as a "closing order" is made and disputed there is a *lis* between the owner and the local authority. The respondent is in the position of a man fighting for his property, with a right of appeal to a particular tribunal, and he is entitled to an opportunity of appearing before that tribunal and hearing the case of the other side. . . . In the application of the Act to Scotland the appeal is to the Sheriff, who is a judicial officer, which shows that the proceeding is judicial, and the ordinary principles of justice and rules of evidence should be applied to it'.[26]

Such a view, it will be noticed, reflects the principle embodied in Article 39 of Magna Carta that no one shall be disseised, except by lawful judgment in accordance with the law of the land. In 1915, administrative encroachment was still carried out with circumspection, and it did not seem remarkable to hold that if administrative departments exercised judicial functions in respect of dispossessions of property, they should conduct their proceedings in accordance with principles scrupulously observed over the centuries by the ordinary courts. As an illustration of this, Buckley, L.J., remarks at the end of his judgment[27]—

'In my judgment it would as matter of public policy be very inexpedient for a Department of the Government in whom powers such as these are vested by statute to refuse an appellant an oral hearing if he requests it. It is not expedient that a party should be sent away with a grievance. It is desirable that the decision of a Government Department, equally with that of a Court of Justice, should be arrived at and pronounced in full publicity and in such manner as to satisfy the public conscience

[25] [1914] 1 K.B. 199.
[26] (1915) 84 L.J.K.B. 72 at 75.
[27] [1914] 1 K.B. 160 at 190.

that the case has been heard and a decision pronounced after full opportunity given to the party to make and sustain his case'.

This expression of opinion has been almost completely ignored in recent developments in administrative practice, with the result that suspicion of administrative tribunals is now widespread.

The judgment of Vaughan Williams, L.J., squarely faces the issues of principle which are involved in the case. He points out that the Housing and Town Planning Act, 1909, does not deal with the requirements of natural justice as applied to administrative tribunals, although he is quite clear that an appeal by a houseowner against a closing order is a *lis inter partes,* where the Board must ascertain both the law and the facts, and 'the Board, acting in good faith and fairly listening to both sides, must disclose all the evidence of fact placed before them and also the conclusions in law adopted by them as the basis of their decision'.[28] He also takes up the position, which on principle would appear to be unchallengeable, that where Parliament commits judicial functions to a Government department, then, unless the Act expressly permits it to dispense with the requirements of natural justice, these requirements must be read into the procedure for the hearing. That being the case, in the opinion of Vaughan Williams, L.J., the non-production of the inspector's report was a violation of these principles, which invalidated the Board's decision. As the learned Lord Justice pointed out, what the Board was claiming was to be a judge and a party to the appeal, and at the same time to deny to the other party the right to see the report on which the order had been based, on the grounds that it was confidential.

Later in his judgment, Vaughan Williams, L.J., makes a second point, which has recently acquired a fresh importance. Arlidge had asked for particulars of those members of the Board who had actually made the decision. On this the learned Lord Justice commented[29]—

'I am not sure that there is not an obligation on the Local Government Board when showing cause to make it plain that in fact the decision was arrived at by an act of decision done by a member of the Local Government Board or some other duly qualified person or officer. This the affidavit of Sir Horace

[28] [1914] 1 K.B. 160 at 175.
[29] *Ibid.,* at p. 179.

Monro does not express, and I am sure that one would not be justified in saying the deponent avoids expressing. I doubt if it is a case which is properly met by any legal presumption that the Board in fact complied with a statutory obligation. The obvious reason why the appellant wishes to know who in fact decided or was deputed to decide the matters arising on the appeal was to discover whether the person deciding had jurisdiction'.

In a recent case, this question assumed cardinal importance. In *Woollett* v. *Minister of Agriculture*,[30] two members of the Agricultural Land Tribunal, which had issued an order dispossessing a farmer, had never been appointed by the Ministry at all. There could be no clearer illustration of the importance of Vaughan Williams, L.J's observations.

Buckley, L.J., was equally clear that the procedural rules of the Local Government Board must conform to the requirements of natural justice, and that in this instance they did not do so, and his judgment deals at greater length than the others with those requirements. He says[33]—

'For instance, the Board could not make a rule—first, that neither the appellant nor the local authority should be heard orally or in writing or in any manner whatsoever; nor, secondly, that each should be heard but only in the absence of the other; nor, thirdly, that neither should be informed of the facts alleged or arguments advanced by the other. These would each and all be contrary to natural justice. I think and will assume that, fourthly, a rule could be made that each should be heard originally, not orally but in writing; but, fifthly, I greatly doubt whether a rule would be valid that a party who having submitted his case in writing desired to be heard orally should not be so heard'.

Hamilton, L.J. (Lord Sumner), as we have seen, thought the term "natural justice" vague, although Buckley, L.J., had given a precise content to it, and he thought the question of an oral presentation of a case unimportant. He also found nothing exceptionable in the practice of treating the report of the inspector as confidential. It would not be unfair to say that Hamilton, L.J., gave an extremely restricted meaning to "natural justice", and found nothing exceptionable in the practice of the adminis-

[30] [1954] 1 W.L.R. 1149; 3 W.L.R. 776 (C.A.).
[33] [1914] 1 K.B. 160 at 185.

trative tribunal. Although the passage of time has shown this view to be over-optimistic, it was adopted in all essentials by the House of Lords. Lord Haldane, L.C., neatly summarised the conflicting views in the Court of Appeal.[34]

'It is obvious (he said) that two of the judges there based their conclusions on the principle that, in the absence of a direction to the contrary, which they could not find in the statute, the analogy of the procedure in a court of justice must guide them. Lord Justice Hamilton, on the contrary, thought that he found in the statute a scheme of procedure which excluded this analogy'.

Later, he adds[35]—

'When the duty of deciding an appeal is imposed [on an administrative body], those whose duty it is to decide it must act judicially. They must deal with the question referred to them without bias, and they must give to each of the parties the opportunity of presenting adequately the case made. The decision must be come to in the spirit and with the sense of responsibility of a tribunal whose duty it is to mete out justice. But it does not follow that the procedure of every such tribunal must be the same. In the case of a court of law tradition in this country has prescribed certain principles to which in the main the procedure must conform. But what that procedure is to be in detail must depend on the nature of the tribunal'.

This does not leave very much of the conception of natural justice intact, for many matters normally considered to be inherent in it can also be described as matters of detail, if the Court is so disposed. Lord Shaw, in his speech, reduced the term to even more shadowy texture, for he observes[36]—

'The words "natural justice" occur in arguments and sometimes in judicial pronouncements in such cases. When a central administrative board deals with an appeal from a local authority it must do its best to act justly, and to reach just ends by just means. If a statute prescribes the means it must employ them. If it is left without express guidance it must still act honestly and by honest means. In regard to these, certain ways and methods of judicial procedure may very likely be imitated; and lawyer-

[34] [1915] A.C. 120 at 130.
[35] *Ibid.*, at p. 132.
[36] [1915] A.C. 120 at 138.

like methods may find especial favour from lawyers. But that the judiciary should presume to impose its own methods on administrative or executive officers is a usurpation, and the assumption that the methods of natural justice are *ex necessitate* those of courts of justice is wholly unfounded. This is expressly applicable to steps of procedure or forms of pleading. In so far as the term "natural justice" means that a result or process should be just, it is harmless though it may be a high-sounding expression; in so far as it attempts to reflect the old *jus naturale* it is a confused and unwarranted transfer into the ethical sphere of a term employed for other distinctions; and, in so far as it is resorted to for other purposes, it is vacuous'.

So natural justice, according to Lord Shaw has nothing to do with steps in procedure or forms of procedure. It is an unwarranted transfer into the ethical sphere of a term employed for other distinctions. What then, if anything, does it mean? Nothing of value in such cases, says Lord Shaw, and after showing undue humility concerning the functions of courts of justice, abdicates in favour of the executive, with results which today are only too apparent. Lord Moulton goes even farther, if this is possible. He says that the question whether the procedure adopted in confirming the closing order was contrary to natural justice could not possibly be considered by the courts. 'Such a question would be unmeaning in such a connection'.[37] Finally, Lord Parmoor avoids the term "natural justice" altogether. He asks whether the procedure is in accordance with the principles of substantial justice, but omits any attempt to define the term, and it is therefore not altogether surprising to find that he is of opinion that those undefined principles have been followed by the Board in this case.

A student of jurisprudence will find much to puzzle him in these speeches in the House of Lords in this appeal. Terms are used in different senses, and without definition to establish a conclusion which the Law Lords would seem to desire for other reasons. The decision, as is well-known, has produced dismal consequences, and much of our present difficulty in removing the manifest deficiencies of modern administrative adjudication may be traced to it. A realist approach to the judgments delivered in this leading case would produce some highly-interesting con-

[37] [1915] A.C. 120 at 150.

clusions. Possibly the most that can be said for it is that their Lordships were unanimous in dismissing 'natural justice' with costs. Only in recent years has the necessity of establishing some objective standard of decision for tribunals of many kinds been effectively reasserted. When the courts returned to a fuller consideration of the question, it was by analogy to their inquiries into the proceedings of tribunals established by many unincorporated associations.

### NATURAL JUSTICE AND DOMESTIC TRIBUNALS

Mr. Lloyd[38] has traced the origin and development of this jurisdiction in terms which make it unnecessary to do more than recall his conclusions. The Common Law Courts from very early times had asserted the right to test expulsions of members from municipal and other corporations by the principles of natural justice which, as Lord Shaw pointed out, were derived from the *jus naturale*. Later, this scrutiny was extended to all kinds of voluntary associations, and the old terminology was retained. Mr. Lloyd summarises the requirements of natural justice in respect of expulsions as follows:

1. When a society is proceeding to expel a member on the ground that his conduct has rendered him liable to expulsion, a notice specifying the charge must be served on him.

2. The society must hold a proper hearing at which the accused member will be charged, and will be given an opportunity to defend himself; but the society need not follow strictly the procedure of a legal tribunal, though it can deal only with the charges of which notice has been given.

3. The tribunal must make its decision in good faith and without bias. Proceedings will be unfair, for example, where the judges are also the prosecutors.

The reasons for this latter principle are self-evident. As a recent writer has shrewdly said—

'Let us not deceive ourselves. Precisely the reason why we do not allow a man to be judge in his own cause is the reason why we dare not allow the recipients of a charity to be administrators of the charity'.[39]

[38] *Unincorporated Associations* (1938), pp. 126–130.

[39] Dr. Russell Kirk, 'The Trap of Disintegrated Liberalism' in *Faith and Freedom*, June, 1954, p. 20.

With the growth in power and numbers of some associations (*e.g.*, trade unions, the General Medical Council and the Law Society), the proceedings of these tribunals have acquired great importance, especially where by statute, power to exclude from a profession has been vested in the professional association. Thus, in *General Medical Council* v. *Spackman*[40] the House of Lords, in sharp contrast with the policy of trusting the executive in *Arlidge's Case,* decided that the General Medical Council, in discharging its statutory duty of determining whether a practitioner should be struck off the register, which could only occur after 'due inquiry', would not discharge that duty properly if it relied upon a decision of the Divorce Court, in which a doctor had been found guilty of adultery with a woman patient. In such cases, said the House of Lords, the Council must give the doctor an opportunity to state his case, and exculpate himself, and Lord Wright, in his speech, said[41]—

'In *Arlidge's Case,* Hamilton, L.J., described the phrase "contrary to natural justice" as "an expression sadly lacking in precision". So it may be and perhaps it is not desirable to attempt to force it into any procrustean bed. But the statements which I have quoted may at least be taken to emphasise the essential requirements that the tribunal should be impartial and that the medical practitioner who is impugned should be given a full and fair opportunity of being heard. These are conditions of the validity of any decision enunciated by the council. A very strong instance of the effect of bias is afforded by *Dimes* v. *Grand Junction Canal.*[42] A decree of the House was there set aside because one member of the tribunal had an interest in the company, unknown to the defendant. It was immaterial that, as Lord Campbell said, "no one can suppose that Lord Cottenham could be in the remotest degree influenced by the interest he had in this concern" If the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice. The decision must be declared to be no decision'.

As might have been expected, there have been stubborn

[40] [1943] A.C. 627.
[41] *Ibid.*, at p. 644.
[42] (1852) 3 H.L.C. 759.

battles over the power of expulsion for misconduct exercised by trade unions. Unless the rules of the union confer upon its officers or committee an arbitrary power of expulsion, the principles of natural justice must be observed, and the cases show that these are identical with the principles of natural justice applicable to other voluntary societies. Indeed, it is in trade union cases that these principles have been defined with greatest precision.[43] What probably raises more difficult problems, however, is whether the rules of a voluntary society may expressly, and validly, exclude the requirements of natural justice, by giving a committee an arbitrary power of exclusion. In the cases, the view has been taken by some judges[44] that rules or articles giving such an arbitrary power are fully binding. More recently, the question has again been decided in respect of another type of voluntary society, the Jockey Club. In *Russell* v. *Duke of Norfolk and Others,*[45] a race-horse trainer was disqualified and warned off the turf, and his licence to train horses was withdrawn by the Jockey Club, which had power to take these steps in their absolute discretion. The trainer contended that the procedure adopted by the Stewards was contrary to natural justice. At first instance Lord Goddard, basing his decision on the observations of Maugham, J., in *Maclean* v. *The Workers Union*[46] decided that the Jockey Club, like a trade union, could dispense with the requirements of natural justice by express provision, which would have contractual force between members. The Court of Appeal preferred to avoid this important issue, by holding that the rules of the Jockey Club do require the Stewards to hold an inquiry in conformity with the principles of natural justice before withdrawing a licence, and that procedure had been followed in this case. Once again the Lords Justices found the term 'natural justice' vague and unsatisfactory, and contented themselves with saying that in all such inquiries, the person concerned should have a reasonable opportunity of presenting his case.

Professor Robson, in the third edition of his *Justice and Administrative Law,* expresses concern at the assumptions underlying this decision. As he points out, if Lord Goddard's argument

[43] *E.g., Maclean* v. *The Workers' Union* [1929] 1 Ch. 602.
[44] *E.g.,* in *Wood* v. *Woad* (1874) L.R. 9 Ex. 190; *Maclean* v. *The Workers' Union, supra.*
[45] [1949] 1 All E.R. 109.
[46] *Supra.*

is correct, voluntary associations of great power, unless expressly restrained by statute, may adopt articles and rules giving an arbitrary power to fine, expel or otherwise punish a member. Unfortunately, there is plenty of evidence that this is being done widely today, and Professor Robson rightly observes—

'When we consider the weakness of the position in which an individual jockey, compositor, railway employee, shipyard worker, motor car distributor, retail newsagent and all kinds of other persons are placed in the modern world, when they confront a powerful trade union, vocational organ or trade association to which they must belong if they are able to carry on their occupation, it is obvious that there are immense opportunities for injustice'.[47]

He also points out that the Court of Appeal in this case once again accepted the hypothesis that natural justice is not an objective standard with a precise meaning. It may vary according to time, place and circumstance. If this is so, then *Arlidge's Case,* which may be regarded as the charter of the administrative tribunal, largely emancipating it from limitations which, curiously enough have always been regarded as essential for the administration of justice by the ordinary courts, is now followed by decisions which offer the easiest of methods whereby voluntary associations of great power may put themselves completely beyond the power of the ordinary courts to impose any check whatever upon their disciplinary proceedings. That such a development constitutes a direct threat to individual liberty can scarcely be challenged. In Professor Robson's words, 'if *Russell's Case* be taken to represent the present state of the law, we are witnessing the decline of more than natural justice in Britain today'. *Russell's Case,* however, is certainly not the last word on this fundamentally important question, and it may well be that the observations of Denning, L.J., in the recent case of *Bonsor* v. *Musician's Union*[48] are a truer indication of the path which the courts will eventually follow. Lord Justice Denning says[49]—

'When one remembers that the rules [of a trade union] are

[47] 3rd ed., p. 331.
[48] [1954] 2 W.L.R. 687.
[49] *Ibid.,* at pp. 691–692. See also Denning, L.J., in *Lee* v. *Showmen's Guild* [1952] 2 Q.B. 329 at 342; and D. Lloyd in 15 M.L.R. 413 at 421.

applied to a man [who has no option but to join it] it will be appreciated that they are not so much a contract, as we used to understand a contract, but they are much more a legislative code laid down by some members of the union to be imposed on all members of the union. They are more like by-laws than a contract. In these circumstances, the rules are to be construed not only against the makers of them but, further, if it should be found that any of these rules are contrary to natural justice, or what comes to the same thing, contrary to what is fair and reasonable, the court would hold them to be invalid'.

Whether the standard be natural justice, substantial justice, or what is reasonable and fair, matters very little, so long as the courts are watchful that individual rights are not trampled upon by the unfettered and arbitrary exercise of powers, and that a man should not be deprived of his livelihood without recourse to a proceeding before an independent tribunal bearing some recognisable resemblance to the proceedings of the ordinary courts.

# 3

# LAW AND PUBLIC POLICY

DENNIS LLOYD

In one of his letters to Mr. Justice Holmes, of the United States Supreme Court, the late Professor Harold Laski related a conversation he had with one of His Majesty's judges the previous evening at a dinner party at the home of Slesser, L.J. The learned judge,[1] who evidently did not belong to the *avant-garde* of legal thought, showed some signs of distress when Laski propounded to him the view that the law of torts was expressive of a certain framework of economic conditions. When Laski then went on to mention Holmes' oft-quoted phrase of the 'inarticulate major premise', the judge (and here I turn to Laski's own words) 'explained to me with something like passion that he had no such premises, that he "simply applied the law, looking neither to the right, nor to the left". I suggested that his mind might be slightly more complex than he knew, to which he retorted that he was a simple and honourable man and that no damned nonsense about complexity was going to obscure his motives. 'I never give a decision', he said 'unless I can find a case to support it'.[2]

It is natural enough that judges should be the last to recognise the fact—which has become increasingly acknowledged since the days when Bentham and Austin laboured to divest the judicial process of its mystery and to penetrate the sacrament of 'declaring the common law'—that within certain narrow limits every new decision on a point of law is a form of legislation. Most judges have a natural distaste for exposing themselves to the charge that they are usurping the function of the legislature and turn with a sense of comfort to the doctrine that their function is solely to say what the law is and not to make new law. If the law were absolutely fixed and certain upon all points which might arise, and the judge had merely—so to speak—to put a coin in a slot machine and pull out a card which infallibly told him the

[1] Macnaghten, J.
[2] *Holmes–Laski Letters* (1953), II, 1412.

right answer, or—to put it in another way—to apply the rules of logic to existing rules and thereby arrive at an inevitable result, this attitude would no doubt correctly summarise the judicial process. Unfortunately however, as we all know, the law contains a mass of doubts and uncertainties not only as to the existence of particular rules but as to their scope and application. Indeed, if the process were as mechanical as is sometimes suggested the standing of the judiciary would probably be a good deal less and its remuneration a good deal lower than is in fact the case. At the present day, although a certain amount of lip-service is still paid to the old doctrine, 'the truth is (as Denning, L.J., has recently written) that [the judges] do every day make law, though it is almost heresy to say so'.[3]

In the case of legislative enactments it is obvious that many factors beyond the law itself must operate to produce the change in the law. These factors must comprise in a greater or less degree all such influences as public opinion, morals, religion, tradition, usage and experience and even fashion or personal idiosyncrasy. And similar factors will doubtless operate, though a good deal less conspicuously, over all those spheres of legal development which are entrusted to courts of law and, as we must add today under the conditions of the modern State, to any other tribunals on which jurisdiction is conferred to settle legal disputes. That this process is but rarely avowed in the course of judicial decisions and indeed is often indignantly denied, need not deter us from acknowledging, as one American lawyer has put it, that 'law wherever found is controlled by factors common to all sorts of administration, whether of government or of other forms of group activity'.[4] There is no need of course to exaggerate the operation of these extra-legal factors, since despite the many uncertainties with which any legal system bristles, there remains a large area where no serious debate can arise as to the operative rule of law or its application to the particular circumstances. Moreover, in many other instances the existence of a precedent bearing a close analogy to the situation before the court will suffice to produce a similar decision regardless of other considerations. None the less, the process of the judicial

[3] *The Changing Law* (1953), p. 45.
[4] Dean Leon Green, cited in Frank, *Law and the Modern Mind* (1930), p. 272.

development of the law is far too complex to be explained merely in terms of the 'logical' application of existing analogies and we must not ignore the other extra-legal factors merely because they remain concealed or disguised. As I have said, these factors operate indiscriminately over the whole field of law, though we can detect their presence more readily in some branches of law, such as tort or the interpretation of statute law, than in others.

Although generally speaking this process goes on silently and unavowed, there are cases where the courts are prepared openly to recognise that there exist certain over-riding principles which though outside the law can yet control it. At one time appeal might here have been made to the once universally recognised system of natural law. But as Sir Percy Winfield has remarked, that system has 'long had its brains knocked out', and in any event it would hardly provide a working tool for a modern judge. The existence of a fundamental *ethos* or *morale* underlying the organisation of the community including its legal system, is accordingly embodied at the present day in the doctrine of public policy.[5] This doctrine recognises that the law is shaped by moral factors and that these must be allowed to operate so as to prevent the law achieving a result which is inconsistent with the *ethos* of the community. It is in the field of contract that public policy is most commonly invoked in order to prevent the courts having to give effect to agreements which are otherwise in all respects valid and binding, but which offend the fundamental principles of morality (using this word in its broadest sense, and not limited to sexual morality) upon which the State is based. I would, however, again emphasise that the special application of this doctrine to the law of contract is in a sense an accident of English legal development, and that there is no fundamental difference in kind between a case where a court refuses to extend the liability of an employer or a landowner and one where a court nullifies a contract on the express ground of public policy. Indeed there are many instances of legal rules which the courts themselves or legal writers have referred expressly to the operation of public policy, such as the standard of proof in divorce cases,[6]

[5] For a fuller treatment of the subject-matter of this paper, see the author's work on *Public Policy: A Comparative Study in English and French Law* (1953).

[6] See *e.g.*, *Preston-Jones* v. *Preston-Jones* [1951] A.C. 391 at 417.

or the rules of vicarious liability.[7] These instances, however, are comparatively rare and accordingly it is the express invocation of public policy in the sphere of contract which gives this doctrine its particular interest.

### SCOPE OF PUBLIC POLICY IN ENGLISH LAW

In view of the general hostility of the courts towards the idea of judicial legislation it is hardly surprising that our judges have treated the notion of public policy as a dubious if not dangerous concept to be invoked only with the utmost caution and hesitation. Public policy we are repeatedly told is an 'unruly horse' and one of those considerations which, as Mr. Justice Holmes has pointed out, 'judges most rarely mention and always with an apology'. Yet as Birkett, L.J., has recently remarked: 'The days are gone (if ever they existed) when lawyers could say that they lived in a world of their own into which particular social or political trends did not intrude'.[8] For all this, attempts have been made and still are made to confine the notion of public policy in a legal strait-jacket and to limit its operation strictly to those so-called 'heads' of public policy which have been laid down in past precedents, and to deny the power of the courts to create a new 'head' of public policy. A word may here be said about this rather sterile controversy.

Ample judicial dicta may be found in support of the narrow view that the rules of public policy have crystallised into specific heads or categories and that there is no power in the courts to create a new head of public policy at the present day. Not unnaturally it is the more conservative judges, such as Parke, B.,[9] and Lord Halsbury,[10] who are to be found ranged in this camp. On the other side, however, and largely cancelling out the effect of such dicta, are to be found numerous judicial pronouncements in favour of the view that while the rules of public policy have in some instances crystallised into fixed rules of law, there still remains a broad field within which the courts can apply variable notions of policy as 'a principal of judicial legislation or interpretation founded on the current needs of the community'.[11]

[7] See Salmond, *Law of Torts* (11th ed. 1953), p. 97.
[8] (1952) 15 M.L.R. at 280.
[9] *Egerton* v. *Brownlow* (1853) 4 H.L.C. 1 at 122–124.
[10] *Janson* v. *Driefontein Consolidated Mines Ltd.* [1902] A.C. 484 at 491.
[11] Winfield, 42 *Harv. L.R.* 76 at 92.

'This variability (says Sir Percy Winfield) is a stone in the edifice of the doctrine, and not a missile to be flung at it. Public policy would be almost useless without it'.[12] In support of this approach are to be found such judicial names as Lord Haldane,[13] McCardie, J.,[14] and Lord Atkin.[15] In the main it is also the view approved by legal writers,[16] and in this connection the words of Sir Carleton Allen may be recalled that 'it is very significant to observe how, in the great *Nordenfelt Case*,[17] the majority of the Lords quite candidly avowed that whatever the policy had been in the past, the time had come quite deliberately to change it'.[18]

An intermediate position, though one leaning towards the narrower view rather than the contrary, has recently—and perhaps one may respectfully add, unexpectedly—been taken up by Lord Wright. Lord Wright does not lay down categorically that no new heads of policy may be created but merely that it is difficult in these days to conceive of any new head of public policy being discovered.[19] In his view the real limiting factor is not the inability to create a new head of public policy as such, but the application of the strict common law doctrine of judicial precedent. 'Judges (he observes) are sworn to administer the law and not to direct themselves on their individual views of what the law ought to be . . .'.[20] '[Public policy is] a body of principles within the common law . . . I regard its rules as governed by precedent like any other branch of the common law or equity'.[21] A somewhat ill-defined qualification is nevertheless admitted in that, within the limits of any specific rule of public policy, 'there is room for changes in application as the times change'.[22] 'What public policy requires in the circumstances of our times may not be required in the circumstances of another age. The rule remains the same, but its application is conditioned by the facts . . .'[23]

12 Winfield, 42 *Harv. L.R.* 76 at 95.
13 *Rodriguez* v. *Speyer* [1919] A.C. 59 at 88–91.
14 *Naylor* v. *K.I.G.* [1918] 1 K.B. 331 at 342.
15 *Fender* v. *Mildmay* [1938] A.C. 1 at 11–12.
16 See Winfield, *loc. cit.*; W. S. M. Knight, 38 *L.Q.R.* 207; C. K. Allen, *Legal Duties* (1931), p. 201. *Contra,* Cheshire and Fifoot, *Law of Contract* (3rd ed. 1952), p. 281.
17 *Nordenfelt* v. *Maxim Nordenfelt & Co.* [1894] A.C. 535.
18 *Legal Duties,* p. 201.
19 *Fender* v. *Mildmay* [1938] A.C. 1 at 40.
20 See Wright, *Legal Essays and Addresses* (1939), p. 68.
21 *Ibid.,* p. 91. 22 P. 77. 23 Pp. 94–95.

It seems doubtful, however, whether the doctrine of public policy can be rigidly confined to a fixed number of heads. For not only is it impossible to define specifically the particular categories into which public policy may be divided, but this restriction is hardly to be maintained in a developing system of law. Similar problems have arisen in other branches of law, as for instance, the law of torts, where attempts have been made to confine the law to a list of torts finally settled for all time. This rigid approach must inevitably be rejected if the law is to remain free to develop and it hardly assists the controversy to suggest that it is hard at the present day to think of a new tort being discovered. In the infinite permutations of human affairs new situations will inevitably arise and the law must remain free to adapt itself from time to time to novel and unforeseen conditions.

More troublesome is the question raised by Lord Wright whether precedents relating to public policy are as binding in the strict legal sense as in the case of ordinary legal rules. It is certainly in accordance with the spirit of the common law that questions once decided are to be treated as binding for the future and broadly speaking there seems little doubt that this applies to public policy as well as to rules of law strictly so-called. Lord Wright does however recognise that the application of the rule may change from time to time and this must necessarily confer some latitude and flexibility in the use of the doctrine of public policy. The true view may perhaps be that public policy is really what is sometimes called a 'standard', which is to be applied to differing facts as they arise and in accordance with existing conditions. The best instance of such a standard is to be found in the law of negligence, where the courts lay down the standard of care, *viz.*, that of the average prudent man, and then apply it afresh to each new case where negligence is alleged. And just as the reasonable man may not change fundamentally as a standard from age to age, still he will apply his prudence and foresight differently under changed conditions, and what may not be negligent in 1850 might be viewed very differently a hundred years later,[24] so the current of public policy may also vary, and what is regarded as a reprehensible practice in one age, as, for instance, creating a monopoly, may now 'lead to universal

[24] See *e.g.*, *Lloyd's Bank* v. *Railway Executive* [1952] 1 All E.R. 1248.

admiration'.[25] Another excellent illustration is afforded by the law relating to obscene publications. In *R.* v. *Hicklin* in 1868,[26] the test of obscenity was laid down as being whether the tendency of the publication is to corrupt and deprave those whose minds are open to immoral influences. Only the other day a judge at the Old Bailey had to remind a jury that it is necessary to take into account the changed approach to sex since 1868—when even the legs of tables and chairs were draped in the interests of decency—and that the question is whether the tendency of the book is to corrupt the modern and not the mid-Victorian reader.[27] On this view, any particular decision on public policy is really no more than a decision of *fact* as to what the courts at the time regard as contrary to or in accordance with current policy, and is no more than a guide to future judges, who may be free to decide that with the passing of the previously existing conditions the applicable policy has also undergone a change. It must be admitted however that the English devotion to precedent does tend to turn decisions of pure fact into questions of law once they have been embodied in reported cases, and this tendency can be seen to operate in the sphere of public policy as well as in the case of other standards, such as negligence or good faith. Moreover whereas in such a case as the exercise of reasonable care, the court has a ready-made test to apply, *viz.*, what a jury of twelve reasonable men and women regard as within the standard of average prudence, there is hardly any such approved measure by which to gauge individual cases of public policy. I will revert to this point later when I come to mention the way in which our courts are supposed to ascertain current policy, but for the moment I would point out that little assistance is to be derived from such statements as that 'the harm to the public [must be] substantially incontestable'.[28]

## PUBLIC POLICY IN CIVIL LAW SYSTEMS

It has sometimes been suggested that the doctrine of public policy is a distinctively English one and peculiar to the common

[25] Paton, *Jurisprudence* (2nd ed. 1951), p. 99; cf. *R.* v. *Waddington* (1800) 1 East at 155; and *Mogul S.S. Co.* v. *McGregor, Gow & Co.* [1892] A.C. 25.

[26] (1868) L.R. 3 Q.B. 360.

[27] *R.* v. *Martin Secker* [1954] 2 All E.R. 683 (Stable, J.).

[28] *Per* Lord Atkin in *Fender* v. *Mildmay* [1938] A.C. 1 at 12.

law.[29] This is however an error since all civil law codes embody similar principles under the names of public order or good morals. The only open question—and one to which I shall return—is whether the civil law systems do not make a much wider use of these concepts than is admissible under the common law.[30] A typical example is provided by the French Civil Code which denies legal efficacy to agreements which are contrary to public order or good morals.[31] Since French law, like the common law, confers a general contractual freedom subject to any specific prohibition, the provisions of the Code relating to public order and good morals have been used by the courts—in much the same way as the doctrine of public policy has been used in England, and with similar results—to invalidate agreements which though not contrary to law are regarded as having a strong anti-social tendency and therefore as unfit to be enforced by a court of law. Since the Code nowhere seeks to define the meaning or content of the concepts of public order or good morals it has been left to the courts to develop and apply these standards as a matter of judicial discretion, and a vast body of case-law has grown up on the subject. Broadly speaking the French judges have used these provisions to annul agreements comparable to those which would be rendered invalid under the doctrine of public policy. In the early days some dislike was felt for the wide discretion which the Code thus appeared to confer on the judiciary. As one French writer observes, 'it was the result of distrust for judicial intervention. Today we no longer entertain such fears'.[32] Criticisms are still occasionally heard on the ground that this judicial freedom involves an encroachment on legal certainty, for the idea that to concede to the judge some freedom to make new law is destructive of that mythical entity, legal certainty, is one that dies very hard.

The civil law has however by its very structure remained free from the controversy regarding 'heads' of public policy to which I have referred. It is the duty of the judiciary to apply the Code and the fact that this does not define the content of good order and morals inevitably leaves it open to the courts to say what

29 See C. K. Allen, *loc. cit.*; Winfield, 42 *Harv. L.R.* 98; Paton, *op. cit.*, p. 98.
30 Cf. Gutteridge, *Comparative Law* (2nd ed. 1949), p. 98.
31 *Civil Code*, arts. 6, 1131 and 1133.
32 Planiol, *Traité Elém. de Droit Civil* (1948), II, § 102.

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infringes those principles. The law has thus developed freely on that basis and attempts to establish the basic principles or criteria of public order have always failed.[33] Moreover the absence of any rigid doctrine of binding precedent has prevented any suggestion that once a rule of morality is enshrined in a precedent it becomes a rule of law for all time which succeeding courts are bound to follow. The courts have also, even in the case of established rules, regarded themselves as free to vary them under changing conditions. Thus marriage-brokage agreements were held invalid in 1855 by the highest court[34] on the ground that there was need for absolutely free consent in entering upon matrimony, and that there was a danger inherent in allowing consent to be procured by one whose interest in the marriage was purely financial. This view was reinforced at the time by the absence of any provision for divorce. Since that day divorce has been introduced into French law and a more secular view is now taken of the institution of marriage. This change has been reflected in the decisions on public order which have gradually recognised that under modern conditions marriage-brokage need not necessarily be harmful or anti-social: indeed the flourishing condition of the matrimonial press and matrimonial agencies rather indicates that these meet a definite social need for some sections of the community. At first the French courts would only permit the broker to sue for his reasonable expenses,[35] but this was later extended by allowing him to claim on a time and work basis, thus allowing him in effect to recover reasonable remuneration.[36] Agreements were however still annulled where the fee was dependent on results[37] or was based on the amount of the dowry,[38] though the court refused to regard all marriage-brokage agreements as invalid, since many marriages were based solely on interest and *'le mariage est devenu une affaire'*. Finally in 1944, the *Cour de Cassation* has upheld the validity of all such agreements provided the broker does not have recourse to fraudulent means.[39] It is interesting to contrast this development with the attitude of English law. In 1614 such an

[33] See Colin et Capitant, *Cours Elém. de Droit Civil* (1945–1948), I, p. 11.
[34] D.55.1.147 *(Cour de Cassation)*.
[35] S.84.2.100.
[36] S.1914.2.102.
[37] See Planiol et Ripert, *Traité Pratique de Droit Civil,* II, p. 80.
[38] D.1908.2.81.
[39] D.1945, 325.

agreement was held valid at common law[40] though after some doubts it was finally settled in 1750 that Equity would grant relief.[41] The invalidity of such agreements at the present day was finally upheld in 1905 in the case of *Hermann* v. *Charlesworth*.[42] Such is the force of precedent under our system that it seems unlikely, whatever theoretical scope there may be for change in this sphere, that this decision will be disturbed, despite the changed conditions of social life at the present day.

The existence of such similar doctrines in both the common law and the civil law, and the similarity of their application—despite important differences of detail—lead to the inference that these doctrines meet a fundamental need in any modern legal system. No modern system of law can fail to acknowledge, either explicitly or implicitly, that the law is a body of rules to be developed and applied with regard to the exigencies of the public interest and of overriding moral considerations. As I have said, this fundamental sub-stratum of thought must necessarily operate in a limited way over the whole range of legal development. More particularly in regard to agreements, where the law accords a general freedom of contract and indeed, as in England, even erects this into a cardinal principle of public policy,[43] some ultimate reserve power must be lodged in the courts to refuse to lend their support to transactions which shock the moral order upon which society is based. Otherwise the court would find itself constrained to enforce such agreements provided they did not infringe some specific statutory or criminal prohibition. This then is the basis upon which the court acts; the litigants are driven away from the judgment seat not because they have been guilty of some illegality but because it would offend the very basis of the social order if the courts were to allow the machinery of the law to be invoked for the purpose of enforcing an immoral transaction. It must be admitted that this high-minded attitude may not seem entirely appropriate in all the instances in which it is adopted. Thus while such an attitude is fitting enough in relation to an agreement depriving a man of personal liberty and reducing him to the status of a serf,[44] or to an agreement

[40] *Grisley* v. *Lother* (1614) Hob. 10.
[41] *Cole* v. *Gibson* (1750) 1 Ves.Sen. 503.
[42] [1905] 2 K.B. 123. See on this topic generally, R. Powell, 'Marriage Brocage Agreements' (1953) 6 *Current Legal Problems*, p. 254 *et seq.*
[43] *Printing & Registering Co.* v. *Sampson* (1875) L.R. 19 Eq. at 462.
[44] *Horwood* v. *Millar's Timber Co., Ltd.* [1917] 1 K.B. 305.

conducive to sexual immorality,[45] or unfairly restricting a man in the pursuance of his lawful trade,[46] it is more difficult to grasp the policy behind the rule which in the case of clauses in restraint of marriage may produce a different result according to whether there is a strict settlement or a trust for sale.[47] Where such refinements are acknowledged it is hard to recognise any fundamental policy at stake or any encroachment, in the language of Sheppard's Touchstone, on the 'liberty of the law'.[48] Here again however what is really at fault is an over-rigid application of the rule of *stare decisis* making it difficult to rationalise the law without legislative intervention.

### PUBLIC POLICY IN PRIVATE INTERNATIONAL LAW

It is not only in the sphere of domestic law that we find this principle of public policy at work. For similar problems arise in the realm of private international law. The modern rules of the conflict of laws provide for the giving effect to foreign transactions in the domestic tribunal and according to the tenor of the appropriate foreign legal system. And just as in the sphere of domestic law the general freedom of contract calls for some restrictive principle whereby the courts can withhold their support from transactions inimical to the public welfare, so, too, there must be some residuary principle which will render it possible to reject a foreign law or transaction if its nature or consequences are inadmissible. Or as one French writer has put it, the admission of foreign law in certain circumstances is not to give *carte blanche* to all the legislators of the world.[49] For this purpose French law invokes the principle of *ordre public,* and English law employs the doctrine of public policy. Accordingly foreign agreements have been held invalid and unenforceable in England by reason of unlawful duress,[50] or where the agreement was champertous,[51] or contemplated collusive divorce proceedings in this country.[52] Some doubt has been expressed as to whether the rule of public policy is not or ought not to be somewhat

[45] *Upfill* v. *Wright* [1911] 1 K.B. 506.
[46] *Mason* v. *Provident Clothing Co.* [1913] A.C. 724.
[47] See *Bellairs* v. *Bellairs* (1874) L.R. 18 Eq. 510.
[48] At p. 132.
[49] Batiffol, *Traité Elém. de droit int. privé* (1949), p. 376.
[50] *Kaufman* v. *Gerson* [1904] 1 K.B. 591.
[51] *Grell* v. *Levy* (1864) 16 C.B. (N.S.) 73.
[52] *Hope* v. *Hope* (1857) 4 De G.M. & G. 731.

more restricted in its operation in private international law than in ordinary domestic law. Thus Dr. Cheshire states that 'it is essential to repudiate the idea that an action on a foreign transaction must necessarily fail if, had it been a purely domestic transaction, it would have offended the English doctrine of public policy'.[53] Suppose for instance a covenant in restraint of trade in a foreign contract where the restraint is only to operate within the foreign territory and the covenant is perfectly valid by the local law, though it would be held invalid and against public policy in an English contract. Ought the English court to refuse to lend its aid to such a contract notwithstanding its validity as judged by the foreign law? No, says Dr. Cheshire, since one must have regard to what the particular rule is designed to prevent and the English rule as to restraint of trade is designed only to preserve liberty of trade in England. 'An English judge (he adds) may feel impressed with the superior virtue of his own law, but he can scarcely presume to dictate to foreigners what will best serve their social and economic interests'.[54]

Whether or not this correctly states the underlying policy behind the English cases on restraint of trade, it must be admitted that there are cases in English private international law where a purely foreign transaction has been treated as void in an English court on the ground of domestic public policy although the transaction was perfectly valid by the foreign law.[55] It may be however that English public policy will only be invoked in this way where the transaction is regarded as absolutely immoral or inadmissible, or as one French writer puts it, where it 'absolutely conflicts with the fundamental conceptions of the juridical order'.[56] This appears to be the attitude of French law on this matter, and it may well be that the English courts would similarly limit the operation of its own doctrine of public policy in such a case as that of a foreign covenant in restraint of trade, to which I have referred.

I have already indicated that the suggestion is occasionally put forward that the civil law makes a wider use of the notion of public order than that which is made of public policy in England. Thus Dr. Martin Wolff writes that 'the part public

[53] *Private International Law* (4th ed. 1952), p. 142.
[54] Cheshire, *op. cit.*, p. 138.
[55] *E.g.*, *Kaufman* v. *Gerson* [1904] 1 K.B. 591.
[56] Lerebours-Pigeonnière, *Précis de droit int. privé*, 5th ed., § 269.

policy plays in this country is smaller and less important than on the continent. English courts hesitate to raise the question whether any foreign rule is or is not consistent with English principles of justice'.[57] We have seen that so far as the application of public policy to foreign agreements is concerned this is hardly the case, but the main ground on which this notion rests is in regard to status. And here I must draw attention to a basic distinction in the way English law and continental law approach this problem. In the civil law applied in continental countries status is derived from the personal law of the parties, that is, the law of their nationality. Hence a French court in granting a divorce to foreign nationals will apply to them their own national law. This means that the grounds upon which foreigners may be granted a divorce in France may differ from those recognised in domestic French law. Does this entail the consequence that if a foreign law allows a divorce by mutual consent (which is not recognised by French law), and two nationals of that country are living in France and apply for a divorce to the French court on the ground of mutual consent, that the French court is bound to grant them a decree? The answer is, not necessarily, because French law will here invoke the doctrine of public order and will accordingly not allow a divorce to be granted in France on some ground not permitted by French domestic law, at any rate if that ground is, as in the case of a divorce by mutual consent, regarded as contrary to the fundamental nature of the social order,[58] On the other hand, French law distinguishes between cases where vested rights are properly acquired by foreigners under a foreign system and cases where it is sought to acquire rights directly by proceedings in France. Thus even in the days when divorce was not recognised by French law a divorce decree obtained by foreigners abroad was upheld,[59] and at the present day a foreign decree will be admitted though granted on grounds not known in France, and even in the case of a decree based on mutual consent.[60] This is sometimes expressed by saying that *ordre public* has an 'attenuated effect' in the case of vested

[57] *Private International Law* (2nd ed. 1950), p. 176.
[58] But the authorities are not unanimous (see Batiffol, *op. cit.*, § 462); Lerebours-Pigeonnière excludes divorce by mutual consent but not divorce based on insanity: *op. cit.*, § 336.
[59] S.60.1.210.
[60] See Batiffol, *op. cit.*, §§ 462–463.

rights acquired abroad.[61] The same principles are applied to other matters of status such as affiliation proceedings,[62] legitimation,[63] and marriage.[64] Thus foreign nationals are permitted to marry in France in accordance with their own law but this right is qualified by invoking public order where the foreign law ignores vital social considerations. Hence a lesser minimum age than is required by French law will be upheld unless it is so reduced as to show a disregard of the needs of civilised society.[65]

When we turn to the English approach to matters of status, such as the divorce of foreigners in England, it is evident that this differs fundamentally from that of the civil law. Divorce in England is the child of statute law and the English courts have always tacitly treated the relevant enactments as overriding in their operation and governing *all* divorce proceedings instituted within their jurisdiction. Accordingly English courts in proceedings before them will apply only the grounds of divorce laid down by English law and there is no need to invoke public policy to exclude foreign rules deemed undesirable, since these have been indiscriminately eliminated *ab initio*. It will be seen therefore that the failure to have recourse to public policy in this sphere is not due to any unwillingness to exclude foreign rules but, on the contrary, results from the distinctly insular approach of the English courts, which have throughout blissfully ignored the existence of any problem of private international law in this situation. The same attitude is also revealed in such matters as proceedings for affiliation, and the provisions governing the formalities and the essential validity of a marriage, as for instance, the minimum age and the prohibited degrees.[66]

## HOW PUBLIC POLICY IS DETERMINED

The subject of public policy is a large one and it is only possible for me in this paper to touch lightly on a few of its salient features. There remains however one matter upon which

[61] *Ibid.*, § 368.
[62] D. 1945, 245.
[63] D.P. 1930.1.113.
[64] Batiffol, *op. cit.*, § 432.
[65] *Ibid.*
[66] See Graveson, *Conflict of Laws* (2nd ed. 1952), p. 104. But not the grounds of nullity, which are to be derived from the *lex domicilii*: see *De Reneville* v. *De Reneville* [1948] P. 100, and *Casey* v. *Casey* [1949] P. 420.

I feel it is necessary to add a few words. I have already indicated that public policy is a kind of 'standard' but that little guidance exists as to how that standard is to be measured or applied. In what way is a judge expected to ascertain the current standard of policy or morality which he is to apply to any given case? One answer of course is that this is a part of the common law, like any other topic, and that he is merely to have recourse to existing case-law, and that public policy is to be developed by the systematic extension of binding precedents according to the ordinary common law pattern. This process will indeed account for a great deal of the development of the notion of public policy in English law, but I have already ventured to suggest that it is to confine the doctrine within too narrow limits. No doubt in most cases some guide or analogy can be afforded by past decisions, but it does not necessarily follow that in the absence of such a guide the transaction must inevitably be upheld.

The clear answer afforded by English law is that it is for the judge himself to say as a matter of law what is the applicable public policy.[67] He cannot hear evidence or conduct any investigation as to the existence or scope of current policy or morality,[68] nor indeed would it be practicable for him to do so. Such an extra-judicial inquiry is wholly outside the tradition of the English courts where the tendency is to 'trust the judge to be a typical representative of his day and generation'.[69] Or as Sir Percy Winfield once expressed it: 'Public policy means the best judgment of distinguished men of the world as distinct from persons learned in the law; English judges have regarded their own views as the highest expression of the former category'.[70] In English law as in French law, the judge is regarded as enshrining the principles of public order and morality in his function as a judge; hence he must form his own view as to what public policy demands and must satisfy himself according to his own lights and such guidance as precedent can afford, whether there is in fact an operative public policy to be applied to the case before him. Indeed the same principle may also apply even in the case of a jury, which may, for instance, be obliged,

[67] *Mogul S.S. Co.* v. *McGregor, Gow & Co.* [1892] A.C. 25 at 45.
[68] *Ibid.*
[69] Paton, *op. cit.*, p. 99.
[70] Cited in *Holmes–Laski Letters*, II, p. 928.

in deciding whether a publication is obscene, to take account of current standards of sexual morality without any evidence being called or even being admissible to guide it as to these standards.[71] The judge must, of course, consult not his personal inclinations but the sense and needs of the community. Nor must public policy be confused with law reform. The question is not whether people as a whole would think something desirable or the contrary, but whether it conflicts or accords with the fundamental order upon which society is based. It is therefore hardly surprising that courts are reluctant to invoke public policy since it will not be frequently that a judge will hear the voice of the community resounding clearly and unequivocally in his own bosom. On the contrary, the answer to most social problems which press upon the modern State is obscure and perplexing and not such as to embolden a court to adopt a positive approach. Such perilous paths are rightly thought to be better left to the legislature, though in some countries such as the United States, where fundamental rights granted under a written constitution may be in issue, the courts may find it impossible to escape this invidious task.

English law, unlike French law, is also opposed to treating a statute as a source of public policy in a case not within its express terms.[72] This is because English law regards statutes as specific encroachments on the general law and therefore not to be extended beyond their express provisions. The civil law on the other hand, theoretically at least, stems entirely from statute; hence there is no conflict between legislation and judge-made law and a statute is regarded as a natural basis for developing public policy.[73] The same result however is, in fact, frequently achieved in England by applying the broad principles of statutory interpretation laid down as long ago as 1584 in *Heydon's Case*.[74]

Cases which explore the foundations of public policy are comparatively rare in our courts for the reasons I have indicated, and one therefore turns with especial interest to a striking example

[71] See *R.* v. *Martin Secker*, cited supra; cf. *R.* v. *Reiter* [1954] 1 All E.R. 741.

[72] See *e.g.*, *Edwards* v. *Porter* [1925] A.C. 1; *Baylis* v. *Blackwell* [1952] K.B. 154; and cf. (1950) 28 *Can. B.R.* 1140–1145.

[73] The use of art. 1965 of the Civil Code (dealing with gaming) affords a good illustration. Cf. D.C. 1944, J. 145.

[74] (1584) 3 Co. Rep. 76.

which has recently been exercising the judges in Canada. In *Re Noble & Wolfe*[75] the High Court of Ontario had to consider the validity of a clause of a type already familiar in United States law under the designation of 'racial covenants'. In 1948 the United States Supreme Court had finally held that such covenants could not be enforced by the state courts,[76] not however on the ground that they were contrary to public policy but because they were held to infringe the provisions of the constitution guaranteeing equal protection before the laws. Since there are no constitutional guarantees of this kind in Canadian law the matter was argued in Ontario on the basis of public policy. The particular transaction before the court was one involving the sale of certain property situated at a summer resort, the property being subject to a covenant prohibiting its being sold, leased to or occupied or used by persons of Jewish, Negro or coloured race or blood. In an earlier case in 1945 before the same court such a covenant was held to be invalid as conflicting with prevailing notions of public policy, and the learned judge who decided that case, Mackay, J., placed particular reliance, as indications of the existence of such a policy, on provisions in public documents to which Canada had adhered, such as the preamble to the United Nations Charter and the Atlantic Charter.[77] The court in *Re Noble & Wolfe* refused to follow this decision and upheld the validity of the covenant, at the same time expressing the view that the earlier case resulted in 'an entirely novel head of public policy',[78] and that it was an 'arbitrary extension of rules of public policy'.[79] To invent new heads of policy and to found thereon the nullification of established rights was not to be encouraged. There was, in the opinion of the court, no policy involved that transcended the paramount public policy of freedom of contract. The danger to the public interest was fanciful and unreal, and whatever view a judge might have, based on his conceptions of justice, morality or convenience, the proper judicial function is to expound and not to create law.[80]

[75] (1948) 4 D.L.R. 123; (1949) 4 D.L.R. 375; (1951) 1 D.L.R. 321.
[76] *Shelley* v. *Kraemer* (1948) 68 Sup. Ct. 836; in *Weiss* v. *Leaon* (1949) 225 S.W. 2d, 127, this was held to exclude only specific enforcement, and not a claim for damages.
[77] *Re Drummond Wren* (1945) 4 D.L.R. 674.
[78] (1948) 4 D.L.R. 123 at 135.
[79] *Ibid.*, at p. 139.
[80] *Ibid.*

On appeal to the Supreme Court of Ontario this decision was upheld, and for reasons which throw a good deal of light on the judicial attitude towards public policy. Thus Robertson, C.J.O., took judicial notice of the fact that it was common knowledge that social intermingling took place at summer resorts, and observed that to maintain a suitable place for social activities of this kind did not offend against any public policy. The Chief Justice was of opinion that this was one of those fields of human impulse and activity in which the law would do well not to intrude itself. 'A wise appreciation of the impotence of laws in the development of such genuine sentiments [as goodwill] . . . no doubt restrains our legislators from creating, and would restrain our courts from propounding, rules of law to enforce what can only be a natural growth'.[81] Henderson, J.A., thought there was no public policy in Ontario on this matter. 'I do know (added the learned judge) that in thousands of ways there exist restrictions which have always existed, and always will continue to exist, by which people are enabled to exercise choice with respect to their friends and neighbours'.[82] Hope, J.A., also took the view that the right to avail oneself of such a restrictive covenant as that before the court was an integral part of the freedom of association, and that the court would only intervene if the clause was unreasonable and unduly oppressive of the public generally.[83] Hogg, J.A., placed reliance on the dicta of English judges that new heads of public policy would not be recognised, and rejected the suggestion that such documents as the United Nations Charter could afford the court any evidence of the operative policy within its own jurisdiction.[84]

The case was further considered on appeal in the Supreme Court of Canada, but unfortunately for our present purpose that court did not afford us the benefit of its views on the subject of public policy as it found itself able to decide the case on quite a different basis, *viz.*, that the covenant was in any event void for uncertainty.[85]

The case is, I think, of significance in its broader aspects from two points of view. Firstly, it emphasises that though there is at present day no conclusive presumption against a new head of

[81] (1949) 4 D.L.R. 375 at 386.
[82] At p. 390.
[83] At pp. 391–392.
[84] At p. 399.
[85] (1951) 1 D.L.R. 321.

public policy the court will adopt an attitude of considerable caution and hesitation before acknowledging its existence. In the absence of any analogy to be derived from past judicial decisions the court will lean heavily in favour of saying that there is no ascertainable public policy on the matter, and that it is for the legislature to create new rules if they are desirable. In stating this the court will, as likely as not, reassert that it has no legislative powers, that it cannot recognise a new head of policy, or that its function is not to create but to expound the law. This is the last refuge of a court which is being pressed too far in the opposite direction, and need not for that reason be taken too seriously. Nevertheless, the innate conservatism of lawyers and the natural judicial dislike for being reversed on appeal have effectively prevented any tendency to make an indiscriminate use of the limited discretion conferred on the judiciary by the notion of public policy in England, or public order in the civil law as applied in continental countries.

Secondly, the 'racial covenant' cases serve as a useful reminder that private litigation is not a suitable field for bold social innovations or experiments and that public policy does not provide a slogan for the solution of deep-seated social or economic problems. As I have indicated, a court of law has no adequate means of investigating such problems or of assessing the social consequences which may result from the enforcement of differing policies. The court has no sources or materials available in the course of resolving a private dispute to enable it to elucidate such problems, nor is it equipped to make a choice between the many controversial viewpoints which might arise. Hence it will only intervene when it feels that the policy it is enforcing is plain beyond controversy, so that to adduce evidence to establish its existence would be futile. This means that in a case where a new head of public policy needs to be adduced from such documents as the United Nations Charter the court will almost certainly reject it as an operative part of its local law. It does not, however, mean that municipal law will necessarily remain immune from the humanising and reforming provisions of such international documents. For while it may be beyond the capacity of local courts to import these bodily into the texture of their legal systems without legislative sanction, indirectly such international conventions may well prove to be a formative element in the liberalising of national systems of law.

# 4

# ABUSE OF RIGHTS

RICHARD O'SULLIVAN

ABUSE of Rights—*l'Abus des Droits*—is a conception of French law which came into existence during the course of the nineteenth century (though the Court of Cassation is always careful to avoid the use of the term) and has given rise to a body of doctrine and of jurisprudence in France and elsewhere. The abuse of a right is considered a 'fault' within the meaning of Article 1382 of the French Civil Code, there being no other text upon which a decision to award damages can be based.

In the year 1855 the Court at Colmar held a man liable for building a chimney of which the sole object was to spoil his neighbour's view. The reasoning of the Court is instructive: 'Considérant que s'il est de principe que le droit de propriété est un droit en quelque sorte absolu, autorisant le propriétaire à user et abuser de la chose, cependant l'exercise de ce droit, comme celui de tout autre, doit avoir pour limite la satisfaction d'un intérêt sérieux et légitime; que *les principes de la morale et de l'équité s'opposent à ce que la justice sanctionne une action inspirée par la malveillance,* accomplie sous l'empire d'une mauvaise passion, ne se justifiant par aucune utilité personnelle et portant un grave préjudice à autrui; qu'ainsi c'est le cas, tout en reconnaissant l'affranchissement de la propriété de l'appelant de tout droit de servitude de vue, de maintenir la décision des premiers juges quant à la démolition de la fausse cheminée . . .'. (The italics are ours.)

The doctrine of *Abus des Droits* has been criticised, *e.g.*, by M. Planiol, as being a contradiction in terms—'If I use my right my act is lawful, and when it is unlawful it is because I exceed my right and act without right'.[1]

[1] *Traité élémentaire de droit civil,* 2nd ed. (1947), Vol. 2, § 978. In Amos and Walton, *Introduction to French Law,* Oxford (1935), p. 256, it is said: '*So long as proof of malicious intention was required,* there was obviously great difficulty in succeeding in a claim of this kind. The Court might, it is true, infer malice from the fact that the act in question was of no advantage to the defendant, and that he must have known that it

The French doctrine of *Abus des Droits* has its parallel in the well-known *Schikaneverbot* which is enunciated in Article 226 of the Bürgerliches Gesetzbuch: 'The exercise of a right is forbidden if it can have no other purpose than to harm some other person'. The tendency of the German Courts has been to put a strict construction on this Article, and to require proof that the right in question has been exercised *solely* for the purpose of inflicting harm on some other person. In appropriate cases proceedings may be taken under Articles 138 and 826 of the Civil Code which are directed to the repression of acts that are against *Sittlichkeit* (*contra bonos mores*).

Article 2 of the Swiss Civil Code provides that 'every person is bound to exercise his rights and to fulfil his obligations according to the principles of good faith. The law does not sanction manifest abuse of a man's rights'. Here again, as an alternative, proceedings may be taken under Article 41 (2) of the Code of Obligations which strikes against acts *contra bonos mores,* or under the provisions of Articles 679 and 684 which direct that the owner of property must exercise his rights with due regard to the rights of adjoining owners.

Under the Chinese Code 'a right cannot be exercised for the main purpose of causing an injury to another'. And under the Soviet Code (1923) civil rights are protected by the law 'save in those cases in which they are exercised in a sense contrary to their economic and social purpose'. Under the Code of 1924 (Art. 30) 'Any act in the law shall be void if it is done with a purpose contrary to law or for the purpose of evading the law'.

In his work on *The Function of Law in the International Community,* Professor Lauterpacht cites certain instances in which it is said that the Swiss Federal Court and the German Staatsgerichtshof, and the Supreme Court of the United States, have recognised and applied the principle of *Abus des Droits.* In the year 1925, indeed, Professor Politis undertook to show that the principle of *Abus des Droits* as applied by the French Courts and developed as a doctrine by French legal writers constitutes a general principle of law which as such has a place in

would injure the plaintiff. But in many cases it might be easy for the defendant to show that he reaped *some* benefit, though this might be small in comparison with the loss sustained by the plaintiff'. (Our italics.)

International Law and is capable of application by International Tribunals.[2]

In *The Function of Law in the International Community*[3] Professor Lauterpacht points out that in International Society, in which there is no authoritative legislative machinery for adapting the law to changed conditions, there is 'both frequent occasion and imperative necessity' for the judicial creation of new torts through the express or implied recognition of a principle postulating the prohibition of Abuse of Rights.[4] The doctrine appears in fact to have been in some sense recognised by the Permanent Court of International Justice in the case of Upper Silesia[5] where the Court said: 'Ce n'est qu'un abus de ce droit (*i.e.*, de disposer de ses biens) ou un manquement au principe de la bonne foi qui pourrait donner à un acte d'aliénation le caractère d'une violation du traité'.[6]

In the light of these arguments and instances it is plausibly said that the principle of *Abus des Droits* is (following the reasoning of Professor Politis) a general principle of law recognised by civilised nations and falls within the provisions of Article 38 (3) of the Statute of the Permanent Court of International Justice. In view of the statement in the latest edition of Oppenheim's *International Law*[7] that the maxim *Sic utere tuo ut alienum non laedas* underlies a substantial part of the law of Tort in English law and the corresponding branches of other systems of law, and 'is one of those general principles of law recognised by civilised states' which the Permanent Court of International Justice is bound to apply by virtue of Article 38 of its Statute, one reads with mild surprise on the same page that 'the extent of the application of the *still controversial doctrine* of the prevention of Abuse of Rights is not at all certain; that it is of recent origin in the literature and practice of International Law, and that it must

2 'Le problème des limitations de la souveraineté', 6 *Recueil des Cours* (1925). And see Professor Lucien Le Fur, *Recueil des Cours* (1927), pp. 786–788.

3 (Oxford), 1933, p. 287.

4 In his work *Nuovi Studi sull' Intervento* (1928) Professor Cavaglieri rejects the application of the doctrine in international law on the grounds that it is a purely natural law conception and that it is ill-suited to the individual character of international law.

5 Arrêt No. 7, p. 30.

6 See also the case of the Free Zones of Upper Savoy, Permanent Court of International Justice, Series A, No. 24; Schwarzenberger, *International Law*, 2nd ed. (1949), pp. 373, 436–439.

7 7th ed. (1948–1952), Vol. 1, Peace, at p. 313.

be left to international tribunals to apply and develop it by reference to individual situations'.[8]

Among continental lawyers of the Roman Tradition the controversy would seem to arise out of the co-existence—alongside the principle *Sic utere tuo ut alienum non laedas*—of the conflicting principle, *Nullus videtur dolo facere qui suo jure utitur—Qui utitur jure suo alterum non laedat.*

Already in the celebrated article on *Abuse of Rights* which he contributed in 1933 to the *Cambridge Law Journal*[9] Professor Gutteridge reported that, with the exception of Josserand, leading civilians were 'somewhat coldly disposed' to the theory of Abuse of Rights.[10] And, apart from his objection to the phrase *Abus de Droit* as a contradiction in terms, M. Planiol was of opinion that the concept had been exaggerated and overworked. According to conversations that Professor Gutteridge had with continental lawyers the doctrine of *Abus des Droits* was regarded as 'a dangerous expedient which should only be utilised to prevent manifest injustice'. M. Capitant was of opinion that all that is meant by the theory is that a man must regard a right which has been conferred on him as carrying with it a duty to refrain from doing any harm to others which can be avoided, which seems to contemplate an excessive rather than an abusive exercise of the right.[11] In Germany, too, according to the strict interpretation which had been put upon Article 226 by the Courts, it was found difficult if not impossible to *prove* that a right had been exercised *solely* for the purpose of harming some other person. And these difficulties of proof were commonly such as to render Article 226 inoperative, a circumstance that is ascribed at least in some measure to the fact that the parties in an action in Germany do not normally give evidence and are not available for cross-examination. German textbooks are accordingly said to devote little space to the doctrine of Abuse of Rights and Article 226 is more or less a dead letter.

[8] (Our italics.) One may perhaps demur to the affirmation that the maxim *Sic utere tuo ut alienum non laedas* underlies a substantial part of the English law of torts, which in fact had its origin in the writs of trespass and of trespass on the case. The maxim *Sic utere tuo* does not, *e.g.* appear among the maxims collected in the index to *Salmond on Torts* (11th ed.), 1953. Cf. also Fifoot, *History and Sources of the Common Law: Tort and Contract* (1949), where the maxim does not appear.

[9] 5 *Cambridge Law Journal*, pp. 22–45.

[10] *Loc. cit.*, at p. 35.

[11] Colin et Capitant, *Cours Élementaire de Droit Civil*, Vol. 2, § 195.

In Switzerland, it is said that, owing to the alternative procedures which are available under Article 41 of the Code of Obligations and Articles 679 and 684 (which protect the rights of adjoining owners) recourse is rarely had to the provisions of Article 2 of the Civil Code, so that the doctrine of Abuse of Rights is there more highly developed in theory than in practice.

In England the need for a doctrine of Abuse of Rights is limited by already existing rules of Common Law and of Statute, *e.g.,* by the law relating to nuisance[12] and to malicious abuse of legal process. In a series of cases extending now over a whole century and having the authority or the approval of the House of Lords, the doctrine of Abuse of Rights in its pure and original form has been consistently rejected.[13] 'The existence of a bad motive in the case of an act which is not itself illegal will not convert that act into a civil wrong for which reparation is due'.[14]

Before examining the English cases it may be profitable to advert to some of the objections mentioned by Professor Gutteridge to the continental doctrine of Abuse of Rights,[15] namely, that it involves an investigation of a psychological order into the question of motive, and the introduction into the matter of an ethical element, both of which are considerations which tend to impede the effective operation of a legal rule.[16] A man, it is said, rarely acts with a single motive; in the majority of cases his intentions are mixed and it often becomes impossible to disentangle from the complex of motives the one which is to be

[12] See, *e.g., Hollywood Silver Fox Farm* v. *Emmott* [1936] K.B. 468; [1936] 1 All E.R. 825. Note the criticism by Professor Holdsworth, 53 *Law Quarterly Review,* p. 1. And cf. *Christie* v. *Davey* [1893] 1 Ch. 316; *Pereira* v. *Vandeyer* [1953] 1 W.L.R. 672.

[13] See, *e.g., Stevenson* v. *Newnham* (1853) 13 C.B. 285 at 297: 'An act which does not amount to a legal injury cannot be actionable because it is done with a bad intent'; *Bradford Corporation* v. *Pickles* [1895] A.C. 587; *Allen* v. *Flood* [1898] A.C. 1; *Ware and De Freville* v. *Motor Trade Association* [1921] 3 K.B. 40; *Crofter Hand Woven Harris Tweed* v. *Veitch* [1942] A.C. 435 at 442 and *passim.*

[14] *Per* Lord Watson in *Allen* v. *Flood* [1898] A.C. 1 at 92. And here one may add that the Italian Civil Code deliberately as it seems omits all reference to abuse of rights.

[15] *Loc. cit.,* at p. 26.

[16] See *Sorrell* v. *Smith* [1925] A.C. 700 at 738–739, *per* Lord Sumner: 'How then can actual malice be excluded from the category of other motives or indeed what other motive can there be in such a matter beyond selfishness and malice, except indeed mere irresponsible wantonness? If motive generally is the test, what if the motives for the action are mixed?'

regarded as the sole or even the dominant impulse of his conduct.[17]

The truth is that in attempting to follow the doctrine of Abuse of Rights we find ourselves at the frontiers of psychology and ethics and jurisprudence—and of the first principles and limits of the laws of evidence. In any civilised community the respect for human personality which is reflected in the rules of evidence (and which excludes alike old habits of torture and new processes of brain washing) makes it no easy matter by lawful evidence to prove the existence of malice in the mind or hatred in the heart.

In the reign of King Henry VII of England, Chief Justice Brian said that 'the thought of man may not be tried for the devil himself knoweth not the thought of man'.[18] The value of the maxim is reinforced by the rule *nemo cogitur seipsum prodere*[19]; and by the protection afforded to a prisoner by, *e.g.,* the judge's rules in English criminal practice.

You cannot indict a man for his thought. According to Christopher St. Germain in the *Doctor and Student*[20] the thought of man—as distinguished from external words and acts—is outside the jurisdiction of the Courts. 'Furthermore, beside the law of man and the law of reason, it was necessary to have the law of God for four reasons . . . (Thirdly) Man may only make a law of such things as he may judge upon and the judgment of man may not be of inward things but only of outward things; and nevertheless it belongeth to perfection that a man be well ordered in both, that is to say, as well inward as outward. Therefore it was necessary to have the law of God, which should order a man as well of inward things as of outward things'.[21]

17 Professor Gutteridge goes on to say that as a result the purely subjective test has in effect been abandoned by all systems of law even by those which began their approach to the problem by its adoption: *loc. cit.,* at p. 26.

18 'Comen erudition est que l'entent d'un home ne serra trié, car le Diable n'ad conusance de l'entent de home': Y.B. 17 Edw. IV, 1. For the knowledge by the devil of the mind of man, see Maritain, *Freedom in the Modern World,* p. 25; and Satan *Desclée de Brouwer* (1948), p. 325. The devil (it seems) is an international figure and belongs with Milton and Goethe and Dante to the literature as well as the legend of the western world.

19 Which has its resonance and analogies in the theories of the several schools of psycho-analysis.

20 16th ed. 1761, p. 9.

21 The doctrine of St. Germain (which may have been taken from John Gerson) coincides with the teaching of Aquinas, S.T. 1, 2, Q. 91, A. 4:

The point was explicitly taken at the trial of Sir Thomas More. The first article in his Indictment was that on a certain day, in the Tower of London, in the presence of Thomas Cromwell and others he had *maliciously kept silence* and declined to give a direct answer to an interrogatory touching the King's Supremacy as Head of the Church in England. 'Idem Thomas adtunc et ibidem *maliciose poenitus silebat* responsumque directum ad illud interrogatorium facere recusabat'. To this count in the Indictment Thomas More demurred: 'For this my taciturnity and silence neither your law nor any law in the world is able justly and rightly to punish me, unless you may besides lay to my charge either some word or some fact in deed'.

The need for some word or some fact in deed (about which evidence can be given) carries with it the corollary that the judicial determination of a matter shall be in accordance with the evidence that is given and not in accordance with any private knowledge in the mind of the judge of which no evidence is given.[22]

To these rules and distinctions of the law of evidence must be added the distinctions that exist between a legal system and

Whether there was any need of a divine law? 'Man can make laws in those matters of which he is competent to judge. But man is not competent to judge of internal acts that are hidden but only of external acts which appear outwardly. Yet for the perfection of virtue it is necessary for man to conduct himself aright in both classes of acts. And since human law could not adequately control and direct internal acts of the mind these acts are necessarily within the jurisdiction of divine law'.

[22] In *Partridge* v. *Strange,* Plowden Commentaries, folios 83–84, listen to Serjeant Saunders *arguendo:*

'You judges have a private knowledge and a judicial knowledge, and of your private knowledge you cannot judge, but may use your discretion. As it appears in 7 Henry IV 41 where the King demanded of Gascoine, J., if he saw one in his presence kill J.S. and another that was innocent was indicted for it before him and found guilty of the same death, what would he do in such a case? And Gascoine answered, that he would respite judgment because he knew that the party was innocent, and make further relation to His Majesty to grant a pardon. And the King was well pleased that the law was so; but there he could not acquit him and give judgment of his own *private* knowledge. But where you have a *judicial* knowledge there you may, and you may give judgment according to it. As if one is arraigned upon an indictment for an offence which is pardoned by Parliament, there you ought not to proceed in it, nor give judgment if he is found guilty, because it appears to you by your *judicial* knowledge that you ought not to arraign him'. See Holdsworth, *History of English Law,* Vol. 5, p. 419; Vol. 9, p. 136. And see Aquinas, S.T. 2, 2, Q. 67, A. 2: 'Utrum judici liceat judicare contra veritatem quam novit, propter ea quae in contrarium proponuntur'. For a contrary view, see Ullmann, *Medieval Idea of Law* (1946), pp. 126–127.

the moral code. In *Donoghue* v. *Stevenson*[23] Lord Atkin said: 'Acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief'.[24] In other words human law does not aim at perfecting the moral life of individuals. And so notwithstanding the finding of the Trial Judge, North, J., that the object of the Defendant in *Bradford* v. *Pickles*,[25] was 'to injure the plaintiffs by carrying off the water and to compel them to buy him off in order to avert it', he decided that the plaintiffs were not entitled to relief on this ground.[26]

In the Court of Appeal in *Bradford* v. *Pickles*,[27] before Lord Herschell, L.C., Lindley and A. L. Smith, L.JJ., it was held that the findings of fact by North, J., were not enough to justify the Court in interfering with the defendant. 'The only question a court of law or Equity can consider is whether the defendant has a right to do what he threatens and intends to do. If he has, he cannot be interfered with, however selfish, vexatious, or even malicious his conduct may be'.[28] In the House of Lords, Lord Halsbury, L.C., Lord Watson, Lord Ashbourne and Lord Macnaghten unanimously affirmed the judgment of the Court of Appeal, and held that no use of property which would be legal if due to a proper motive can become illegal because it is prompted by a motive which is improper or even malicious.[29] 'If it was a lawful act', said Lord Halsbury,[30] 'however ill the

[23] [1932] A.C. 562 at 580.

[24] Cf. Aquinas, S.T., 1, 2, Q. 96, A. 2: 'Utrum ad legem humanam pertineat omnia vitia cohibere', where it is said that human laws do not forbid all vices but only the more grievous vices; and chiefly those without the prohibition of which human society could not be maintained, such as murder, larceny and the like.

[25] [1894] 3 Ch. 53 at 68.

[26] In so deciding he had before his mind the passage in the *Digest* from Marcellus: '*Si non animo vicino nocendi sed suum agrum meliorem faciendi id facit*'. Of this passage Maule, J., said in *Acton* v. *Blundell*, 12 M. & W. 324 at 336: 'The English of it I take to be this, "If a man digs a well in his own field and drains his neighbour's, he may do so unless he does it maliciously . . .". I cannot find any case in which the latter part of the statement has been affirmed or acted upon in this country'. The doctrine of Marcellus was in fact rejected by Baron Martin in *Rawstron* v. *Taylor*, 11 Ex. 369, and in *Chasemore* v. *Richards* (1859) 7 H.L.C. 349 at 388, Lord Wensleydale held that the principle in Marcellus had found no place in our law.

[27] [1895] 1 Ch. 145.

[28] *Ibid.*, at p. 159, *per* Lindley, L.J.

[29] [1895] A.C. 587.

[30] *Ibid.*, at p. 594.

motive might be, he had a right to do it. If it was an unlawful act, however good his motive might be, he would have no right to do it. Motives and intentions in such a question as is now before your Lordships seem to me to be absolutely irrelevant.' Lord Watson added that in this respect the law of Scotland was the same as the law of England. 'No use of property, which would be legal if due to a proper motive, can become illegal because it is prompted by a motive which is improper or even malicious'.[31] And Lord Macnaghten concluded: 'The real answer to the claim of the Corporation is that in such a case motives are immaterial. It is the act, not the motive for the act, that must be regarded. . . . On this point both North, J., and the Court of Appeal decided against the Corporation. And the decision, as it seems to me, is plainly right'.[32]

For an English practitioner the unanimous decision of the judges in all the courts before which the case was considered, puts the decision in *Bradford* v. *Pickles* beyond discussion or dispute. It must be taken to be good English law.

The decision in *Allen* v. *Flood*[33] is in line with the decision in *Bradford* v. *Pickles,* and is in substance that an act lawful in itself is not converted by a malicious or bad motive into an unlawful act so as to make the doer of the act liable to a civil action. 'It was not contended at the Bar', said Lord Herschell, 'that merely to induce [the employers] to take this course would constitute a legal wrong, but it was said to do so because the person inducing them acted maliciously'.[34] On a later page Lord

[31] *Ibid.,* at p. 598.
[32] *Ibid.,* at p. 601.
[33] [1898] A.C. 1.
[34] *Ibid.,* at p. 118. In the Court of Appeal, the Master of the Rolls had thought that this was a question to be determined by a jury. Lord Herschell commented ([1898] A.C. 118) that 'if acts are, or are not, unlawful and actionable, according as the element of malice be present or absent. . . . I can imagine no greater danger to the community than that a jury should be at liberty to impose the penalty of paying damages for acts which are otherwise lawful, because they choose, without any legal definition of the term, to say that they are malicious. No one would know what his rights were. The result would be to put all our actions at the mercy of a particular tribunal whose view of their propriety might differ from our own. However malice may be defined, if motive be an ingredient of it, my sense of the danger would not be diminished'. It is noteworthy that the definition of malice in *Bromage* v. *Prosser* (1825) 4 B. & C. 247 at 255 eliminates motive altogether, and makes malice in its legal sense mean 'a wrongful act done intentionally without just cause or excuse'. And see *Allen* v. *Flood* [1898] A.C. 94, *per* Lord Watson: 'The intentional doing of a wrongful act will make it a malicious wrong in the sense of the law'.

Herschell added: 'It is certainly a general rule of our law that an act *prima facie* lawful is not unlawful and actionable on account of the motive which dictated it. I put aside the case of conspiracy which is anomalous in more than one respect'.[35]

'Why should a combination to injure be actionable whilst action taken by a single person for that purpose and that purpose only is permissible?' The question which has vexed lawyers for a whole generation is put in this way by Lord Porter in the recent case of *Crofter Hand Woven Harris Tweed* v. *Veitch*.[36] He cites with approval the summary of the law by Scrutton, L.J. (who was at a loss to account for the difference) in *Ware and de Freville* v. *Motor Trade Association*.[37] 'I take *Allen* v. *Flood* and *Bradford Corporation* v. *Pickles* to decide that an act otherwise lawful, though harmful, does not become actionable by being done maliciously in the sense of with a bad motive or with intent to injure another. . . . I understand *Quinn* v. *Leatham*[38] to decide that a combination to injure another in his trade and business, not in furtherance of the trade interests of those combining but out of spite against the person injured is actionable'.

The contrast is also pointed in the speech of Viscount Simon, L.C.,[39] 'First then, *apart from the effects of combination*, it is clear (1) that if A is damaged by the action of B, A nevertheless has no remedy against B, if B's act is lawful in itself and is carried out without employing unlawful means. (2) It makes no difference to the above proposition that B in so acting had the purpose of damaging A. A bad motive does not *per se* turn an individual's otherwise lawful act into an unlawful one. . . . But if *the act which damages A is not that of a single individual, but is due to a combination of two or more persons*, then it is no longer possible to say that motive or purpose is immaterial. If . . . the real purpose of the combination is the inflicting of

[35] *Ibid.*, at pp. 123–4. The doctrine has been reaffirmed in recent years by the House of Lords: 'A bad motive does not *per se* turn an individual's otherwise lawful act into an unlawful one': *Crofter Hand Woven Harris Tweed* v. *Veitch* [1942] A.C. 435 at 442, *per* Viscount Simon, L.C., and *passim*.

[36] [1942] A.C. 435 at 487. And see pp. 487–488 for attempts at an answer. At p. 448 Viscount Maugham bravely says: 'I have never felt any difficulty in seeing the great difference between the acts of one person and the acts in combination of two or of a multitude'.

[37] [1921] 3 K.B. 40 at 67.

[38] [1901] A.C. 495.

[39] [1942] A.C. 435 at 442–444. (Our italics.)

damage on A as distinguished from serving the bona fide and legitimate interests of those who so combine, then if damage results to A, the act is tortious. . . . However the origin of the rule may be explained, I take it to be clear that there are cases in which a combination of individuals to act in a certain way, resulting in deliberate damage to others, is actionable, even though the same thing, if done by a single individual without any element of combination, would not expose him to liability'.

The tort of conspiracy introduces us at once to the external order of things which is the proper field of legal inquiry. And here, it is diffidently suggested, may lie the root of difference between the way in which the courts approach cases of alleged malicious abuse of rights by an individual, as in *Bradford* v. *Pickles* (*supra*) and *Allen* v. *Flood* (*supra*), and cases where a number of persons combine and do deliberate damage to another or others. The difference may lie between an inquiry into internal acts of the mind or subjective mental states, and an inquiry into overt, that is to say, external acts and circumstances which constitute or reveal a conspiracy to injure.

Any combination to injure involves an element of deliberate concert between individuals to do harm. 'A conspiracy to injure involves *ex vi termini* . . . a common intention and agreement to injure. . . . "Intention" is generally determined by reference to overt acts and to the circumstances in which they are done. . . . Lord Watson in *Allen* v. *Flood* warns against "the *loose logic which confounds internal feelings with outward acts,* and treats the motive of the actor as one of the means employed by him . . .". To leave to a jury to *decide on the basis of an internal mental state* rather than on the facts from which intent is to be inferred, may be to leave the issue in the hands of the jury as clay to mould at their will'.[40]

'A doctrine founded exclusively on malice has not proved perfectly satisfactory'.[41] It is significant that, already in 1933, Professor Gutteridge had to report that 'the purely subjective test has, in effect, been abandoned by all systems of law, even by those which have begun their approach to the problem [of Abuse of Rights] by its adoption'.[42] What follows? There is, it seems,

[40] *Ibid.*, at pp. 468–471, *per* Lord Wright. (Our italics.)
[41] Lawson, *Negligence in the Civil Law* (1950), p. 17.
[42] *Loc. cit.*, p. 26.

in the very nature of evidence a distinction to be drawn between internal thoughts and acts of the mind which are as such beyond the limit of legal inquiry and words and deeds in the external order of which evidence can be given and inquiry held. And there is accordingly ground for the distinction that exists in English law between the liability of a combination of persons for acts deliberately done to injure another or others and the liability (or non-liability) of a single individual for alleged malicious abuse of rights. If this be so there would seem to be no longer any need for English lawyers *as lawyers* to apologise for the decisions of so many great judges in the House of Lords and elsewhere in the cases of *Bradford* v. *Pickles* and *Allen* v. *Flood*; and *Crofter Hand Woven Harris Tweed* v. *Veitch,* which reaffirmed the doctrine. It is perhaps not entirely an accident that the legal practitioners who fashioned the two great systems of Roman civil law[43] and of English common law alike failed to find a place for a doctrine of *Abus des Droits,* the salient features of which in its developed French form were described by Professor Gutteridge (a not unsympathetic witness) as 'vacillation and nebulosity'.[44] In these circumstances we may perhaps cease to occupy our minds with the spiritual defects and destiny of poor Mr. Pickles and commend his soul at last to the divine mercy, and turn our thoughts to the current activities of the Bradford Corporation—or the Blackpool Corporation[45]—not to mention the soulless and lawless activities of certain Ministries in Whitehall. 'In reality', it has been said,[46] 'the nearest analogues in English law to rights regarded as powers coupled with a trust are governmental discretions committed to public authorities which may only be used to effect the purposes for which they have been

[43] See Buckland and McNair, *Roman Law and Common Law,* 2nd ed. rev. by F. H. Lawson (1952), p. 75; Lawson, *Negligence in the Civil Law* (1950), p. 16.

[44] *Loc. cit.*, p. 35.

[45] In the case of *Blackpool Corporation* v. *Locker* [1948] 1 K.B. 349 at 370, 376, Lord Justice Scott found occasion to speak of 'the really monstrous character of some of the contentions and actions of the Corporation and the Ministry of Health', and of 'a breach of constitutional propriety so grave that he did not know any legal epithet suitable for it'. And Evershed, L.J., spoke of the Corporation's refusal to allow a citizen, whose property was taken out of his hands, to know precisely the authority which was being exercised as an attempt to bludgeon him into submission as an alternative to enduring the costs of litigation which might turn out to be futile. *Ibid.*, at p. 384.

[46] Lawson, *op. cit.*, p. 19.

conferred, and in the exercise of which no extraneous considerations may be taken into account'. In France it seems that the doctrine of *Abus des Droits* finds its model if not its source in the *détournement de pouvoir* of French administrative law. It is not politic in England to waste too much sympathy on public local authorities and ministerial departments.

# 5

# EQUALITY BEFORE THE LAW

DENYS C. HOLLAND

EQUALITY before the law is accepted in theory by all civilised States despite the considerable differences which they exhibit in their political, social and economic policies.[1] Indeed most written Constitutions contain specific provision for equality to be accorded by the law. The Constitution of the Union of Soviet Socialist Republics, for example, declares, in Article 123, that 'the equality of the rights of citizens of the U.S.S.R. irrespective of their nationality or race, in all spheres of economic, state, cultural, social and political life, is an immutable law. Any direct or indirect restriction of these rights, or conversely, any establishment of direct or indirect privileges for citizens on account of their race or nationality, as well as any propagation of racial or national exclusiveness, or hatred and contempt, is punishable by law'. Similarly, the Constitution of the United States of America, despite its quite different aims and emphasis, declares, in the Fourteenth Amendment, that 'no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws'. And in the unwritten British constitution, although Dicey's assertion of the existence of equality has hardly escaped criticism, its desirability as a theoretical ideal is rarely challenged.

However, acceptance in theory, whether in a written or unwritten Constitution, does not necessarily involve application in practice, even if we allow for different political conceptions of the nature and meaning of true equality before the law. In English Law the conception of equality before the law is generally taken to imply that the law should not discriminate between

[1] See Article 1 of the Universal Declaration of Human Rights adopted by the United Nations General Assembly on December 10, 1948, 'All men are born free and equal in dignity and rights'.

persons on account of class, race or religion, and in this limited sense few will deny that substantial equality before the law does exist in this country.[2] But the United Kingdom government and legislature is also ultimately responsible for the law which obtains in the various territories subject to its control, and it is the purpose of this paper to draw attention to the extent to which the law of some of these territories denies equality, in the above sense, to those subject to its jurisdiction. We, in this country, are justly proud of the equality before the law which exists here, but we can hardly condemn with a clear conscience the Nuremberg laws of Nazi Germany or the Apartheid system of South Africa if discrimination of similar character is found in the laws of our dependent territories, even though the nature of the discrimination may not be quite so offensive.

The most serious limitations of equality before the law in these territories take the form of discrimination between different races subject to the same jurisdiction. But I shall also deal with some of the matters in which the laws of these territories deny to all those subject to their jurisdiction liberties and privileges which we in this country commonly regard as fundamental.

## DISCRIMINATION BETWEEN DIFFERENT RACES SUBJECT TO THE SAME JURISDICTION

Discrimination of this sort is found only in those territories with a multi-racial society where the divisions between the races are clear and where, as a rule, one of the races has political and economic power. It is not found in the West African territories, where European settlement has never been extensive and where, in any event, our responsibilities are now coming to an end. Nor is it found in the West Indies, where also European settlement has never been great, and where, in addition, inter-marriage between races, resulting in every gradation of colour between white and black, would make racial definition virtually impossible. It is in the East and Central African dependencies that the conditions exist which make discrimination possible, and it is in those territories that clear discrimination between races is

[2] Some may regret the economic unreality of a concept of equality before the law which, as I believe Anatole France said, forbids the rich and the poor alike to sleep under bridges. Others may regret the decline of *laissez-faire* liberalism and the consequent increase in the powers of the State and State officials.

found. The examples I shall give are mostly taken from Kenya, where such discrimination is perhaps more blatant than elsewhere.[3]

Not all the cases of discrimination are apparent on the face of the law. In Northern Rhodesia, for example, the franchise is not in terms confined to Europeans, but to British subjects with certain qualifications.[4] Since however all but a few of the indigenous African population are not British subjects, but British Protected Persons, the effect of the rule is virtually the same as if the franchise were, as in Kenya, expressly denied to Africans. The result of the express denial of the franchise to Africans in Kenya is that approximately 5,000,000 Africans are represented in the legislature by six members nominated by the Governor, whilst the European community of approximately 100,000 elect fourteen members to represent their interests. Some would deny that the right to vote is involved in the English conception of equality before the law, on the ground that such equality existed in England before the franchise was extended to all.[5] Whether or not this is so, it can hardly be denied that the racial discrimination found in the law of these territories is directly attributable to denial of political rights to the Africans. It is through the exercise of political power that inequalities are most likely to be removed. It is often sought to justify the denial of the franchise to Africans on the ground that the African is as yet not sufficiently mature or educated to exercise it properly. But, even if we assume that some degree of education is necessary for the proper exercise of the franchise (which view is difficult to reconcile with our own policy in territories which have no white settler community), this is no justification for restricting the franchise, not to persons of a certain educational standard (which can be acquired), but to persons with certain racial characteristics (which cannot).

The British Government has recently announced its intention

[3] Some aspects of discrimination in Kenya, particularly in relation to land holding, were dealt with by the writer in last year's volume in this series; 'Law and Order in Kenya' (1954) 7 *Current Legal Problems*, pp. 173–191.

[4] Section 9 of the Legislative Council Ordinance, Chap. 2 of the Laws, 1954 edition.

[5] See W. I. Jennings, *The Law and the Constitution*, 2nd ed., p. 49, where it is pointed out that the liberal concept of equality does not necessarily imply political equality.

of amending the electoral laws of Kenya so as to mitigate, though not eliminate entirely, this particular discrimination between races.[6] It is proposed to introduce elections for Africans in some form, either direct or indirect, or through some form of electoral college, by 1956. But this proposal will not involve the discontinuance of the communal roll, and so long as the system of communal franchise continues there can be little hope of the growth of any genuine national spirit among the races of Kenya. As the Donoughmore Commissioners pointed out in 1928 in relation to Ceylon: 'There can be no hope of binding together the diverse elements of the population in a realisation of their own common kinship and an acknowledgment of common obligation to the country of which they are all citizens as long as the system of communal representation, with all its disintegrating influences, remains a distinctive feature of the constitution'.[7] A multi-racial party has in fact recently been formed in Kenya,[8] but, so long as the communal franchise endures, little hope can be entertained of its becoming a real political force in the territory.

Another sphere in which the law of Kenya discriminates between races is in the mode of criminal trial. Quite apart from emergency provisions, the non-European in Kenya is tried summarily for all offences, except those rendering him liable to the death penalty or life imprisonment,[9] by a judge, who is invariably a European. Even when charged on indictment with an offence involving life imprisonment or death, he is tried, not by jury, but by a judge assisted by three assessors whose opinions the judge may disregard.[10] The European, on the other hand, is tried on indictment by a jury composed of Europeans whenever the offence with which he is charged is one for which he may be sentenced to more than six months imprisonment.[11] This differentiation in the mode of trial between races is not such as to encourage confidence, either within the territory or without, in the impartial administration of criminal justice.[12]

6 See *Hansard*, Vol. 530, col. 1642.
7 Ceylon: Report of the Special Commission on the Constitution, 1928.
8 See *The Times* newspaper, July 10, 1954, for the announcement of the formation of this new party.
9 See the Schedule to the Criminal Procedure Code of Kenya.
10 See sections 258, 259 and 318 (2) of the Criminal Procedure Code.
11 See sections 218 and 222 of the Criminal Procedure Code.
12 For comments on the summary trial of Jomo Kenyatta on a charge of managing Mau Mau, see (1954) 7 *Current Legal Problems*, pp. 183–187. It may be noted that since Kenyatta's conviction on this charge, his land

Nor is it true to say, as is stated in a recent survey made by the Colonial Office,[13] that the punishments provided by the law are the same for all races. Again excepting emergency provisions, the Kenya Detention Camps Ordinance, 1925, permits an African (but no other person) to be sentenced to detention in a detention camp and to be kept at work there without pay.[14] Also, though the law may not on its face provide different punishments for different races, there may well be discrimination between races in the administration of the law, especially where different modes of trial are provided for different races. Thus though collective punishment under the Collective Punishment Ordinance (for which the Colonial Office Survey claims the merit of inculcating 'a sense of communal responsibility'!) may on the face of the law of Kenya be imposed on any section of the community, it has in fact never been imposed on any European section of the community and it is difficult to avoid the conclusion that it was introduced as a special punishment for non-Europeans. It may be remarked here that, in answer to a question in the House of Commons, the Secretary of State for the Colonies recently stated[15] that during the emergency in Kenya twenty-five Europeans had been convicted of assaults on Africans and that the sentences imposed had ranged from a £5 to a £100 fine in the civil courts and from severe reprimand to discharge and imprisonment for five years in the military courts. The lightness of the sentences imposed by the civil courts in these cases, especially when contrasted with the sentences imposed by the

has been declared forfeited by retrospective legislation, and a further punishment involving restrictions on his movements and residence has also been announced; for comments on these punishments when they were first suggested, see *The Times* newspaper, October 21, 1953, and for the announcements of the imposition of these punishments, see the *Manchester Guardian,* September 10, 1954, and the *East Africa and Rhodesia Journal,* October 21, 1954.

[13] *Survey of Different Treatment by Race in British Africa,* issued by the Colonial Office and filed in the Library of the House of Commons. In this Survey it is pointed out that many of the inequalities are concessionary and protective rather than restrictive. Whilst this is true, the granting of special concessions and protections to the weaker section of the community does not in itself justify the imposition of disabilities on those same people. The Survey does not purport to be exhaustive, but none the less some of the omissions (in the field of restrictive laws) are rather remarkable.

[14] The detention referred to here is imposed only on convicted persons. Detention by arbitrary order of the Governor is of non-racial character on the face of the law.

[15] See *Hansard,* Vol. 531, col. 47.

military courts, is hardly calculated to inspire belief in the equal administration of the law to all races.[16]

Until recently the law of the Federated Malay States, like the law of Kenya, openly discriminated in mode of trial between different races. Up to February 25, 1954, the Criminal Procedure Code of the Federated Malay States[17] provided that in the case of trial by a judge with the aid of two assessors, the assessors should be European if the accused was European. There was however no corresponding provision as to the race of the assessors where the accused was non-European. This discrimination in the mode of trial seems to have been removed as the result of the trial of Miss Lee Meng in 1953. Lee Meng was first tried for a capital offence by a judge assisted by two assessors who were both Asians. The judge found her guilty, but the two assessors disagreed, and so, in accordance with the provisions of the Code at that time, the proceedings were stayed and a new trial took place. At the retrial one of the assessors was a European who agreed with the judge on the guilt of Lee Meng, with the result that she was convicted. This decision excited much comment and soon after the Code was amended[18] to provide that 'so far as practicable one assessor shall be of the same race as the accused'. It is also now provided that in the event of both assessors disagreeing with the trial judge, the judge's verdict shall stand, but that there shall be an automatic appeal if either of the assessors disagrees with his verdict.[19]

The possibility of inequalities being imposed by the law in such a way that they are not apparent at first sight is well illustrated by the law and practice relating to the White Highlands in Kenya. The law simply requires the Governor to consult a Highlands Board in making grants of land in the Highlands.[20] In practice however, the Governor acts on the advice

16 We still seem to be a long way from achieving 'fair, impartial administration of justice to all sections of the community, no matter what origin or race' (stated by Lord Jowitt when inaugurating the East African Court of Appeal, as one of the aims of British administration in the Colonies; *The Times* newspaper, June 10, 1951). Yet the *Colonial Office Survey*, referred to above, states 'There is equality of all persons regardless of race before the law and equal access to justice for all'!

17 Section 185.

18 By the Criminal Procedure Code (Amendment) Ordinance, 1954, No. 8 of 1954.

19 By virtue of the same amending Order, No. 8 of 1954.

20 Section 5 (c) of the Kenya (Highlands) Order in Council, 1939.

of the Board, which is so composed as to make it certain that no grants of land to non-Europeans will ever be recommended.[21] That the purpose of the law is in fact to exclude non-Europeans from the Highlands is borne out by the law governing assignments of land, for the assignment of land in the Highlands by an existing grantee to a non-European is expressly prohibited.[22] From recent statements made by the Governor of Kenya[23] and the Secretary of State for the Colonies,[24] it would seem that the Government have every intention of maintaining this situation and, indeed, of encouraging further European immigration to take up unoccupied land in the Highlands.[25] It would seem from a recently published report of the Kenya Indian Congress that control over immigration provides another example of racial equality on the face of the law, accompanied by racial discrimination in administration: the Report points out that although the Immigration Control Ordinance, 1948, and Regulations made thereunder, are non-racial in character, in actual practice the arbitrary powers granted thereby to the Principal Immigration Officer are applied racially against Asians.[26]

As a final example of inequality prescribed by legislation in the Colonies, I should like to draw attention to a recently repealed provision in the Kenya Penal Code[27] which provided that any African who had 'illicit carnal connection' with a 'white woman', and any white woman who permitted an African to have such connection with her, was guilty of an offence punishable with five years imprisonment. If the white woman merely enticed or solicited the African without success, or, if he attempted without success, he or she, as the case may be, was still subject to imprisonment, but for a shorter term. Meanwhile the white man remained free to have 'illicit carnal connection' with Africans, Asians or, of course, Europeans. However, all races have now been placed on an equal footing in this matter.

I turn now for the moment from inequalities between differ-

[21] See *Hansard*, Vol. 510, col. 34, and Vol. 518, col. 34.
[22] By sections 36 and 88 of the Crown Lands Ordinance, 1915.
[23] See *The Times* newspaper, September 30, 1954.
[24] See *The Times* newspaper, October 8, 1954.
[25] For a fuller account of the problem of the Highlands, see 'Law and Order in Kenya' (1954) 7 *Current Legal Problems*, pp. 175–181.
[26] The Report of the Kenya Indian Congress held at Nairobi on July 31 and August 1 and 2, 1954.
[27] Section 159 of the Kenya Penal Code, repealed by section 7 of the Penal Code (Amendment) Ordinance, 1951.

ent races within a dependent territory imposed by legislation to an inequality of a similar nature which appears to be supported by the common law. I refer to the distinction drawn between the legal position of the so-called protected person and that of the British subject. There is no binding authority in the common law on the status of the protected person, but such authority as there is indicates that the common law affords the protected person no protection at all against the Crown or the Crown's servants and agents. He is apparently protected against everybody except his protector, against whom the recent cases of Seretse Khama and the Kabaka suggest he is equally, if not more, in need of protection. Thus, it would appear from *R.* v. *Crewe, ex parte Sekgome*[28] that Act of State may be a defence to an action brought by a protected person, although it is, of course, never available as a defence against a British subject. The opinions expressed on this matter in *Sekgome's Case* were, it is true, *obiter,* since the detention of Sekgome was held by the Judicial Committee of the Privy Council to be authorised by the Foreign Jurisdiction Act, 1890, but there can be little doubt that the position is as stated in that case. So also it would appear from *Sobhuza II* v. *Miller*[29] that whereas an agreement between a British subject and the Crown is enforceable against the Crown, formerly by Petition of Right, and now by action, an agreement between a protected person and the Crown may be held to be a treaty and therefore not cognisable in the ordinary courts. Again, the case is not binding authority for the proposition put forward because here again the action of the Crown in the particular circumstances was held to be validated by the Foreign Jurisdiction Act. One case in which the question of the legal effect of agreements between protected persons and the Crown did come directly before a municipal court was the case of *Ol le Njogo* v. *Att.-Gen.*[30] in which the agreement was held not to be binding on the Crown, but this, being a decision of the East African Court of Appeal does not, of course, bind the English courts.

The above then are a few examples of racial inequalities which are directly or indirectly prescribed by the law within our dependent territories. Of equal, if not greater concern, are the

[28] [1910] 2 K.B. 576.
[29] [1926] A.C. 518.
[30] *East African Law Reports* (1913), Vol. 5, p. 70.

many inequalities in our dependent territories which are not imposed either directly or indirectly by the law, but simply permitted by the law. To remove from the statute book and the law reports all the inequalities between racial groups in dependent territories which are there prescribed either directly or indirectly would obviously not bring about complete equality of social and economic treatment. This, of course, raises the question whether legislation specifically prohibiting unequal treatment should be introduced in our overseas territories. Discrimination on racial grounds is not unknown in the United Kingdom, but there is no doubt that the problem is greater and more urgent in some overseas territories. The value of legislation prohibiting discrimination is admittedly a controversial issue. 'Social scientists', writes Professor Morroe Berger, 'are by no means unanimously in favour of introducing legislation which runs counter to the prejudice and preconceived ideas of a society. Some of them think that the law is effective only when based upon general feeling in the country. Others hold that a law aimed at limiting injustices, even when the latter are tolerated by a large section of the public, helps—by the mere fact of declaring illegal the actions to which they give rise—to convince the waverers, and ends by undermining prejudices'.[31] Legislation alone, it is obvious, cannot completely terminate racial discrimination. To do that requires the collaboration of all races, determined to end the colour bar in the spirit as well as in the letter. But at least the Government can give a lead by itself avoiding discrimination, and by perhaps providing legislative sanctions against some of the more public aspects of racial discrimination, for example, in education, health care and public transport. A step in this direction is the recently published Report of the Lidbury Commission,[32] which recommends a common scale of pay for all races in the civil service in East Africa, subject only to an inducement allowance for entrants coming from certain overseas territories. Whilst this Report, which is being considered by the Governments concerned,[33] is a step towards equality in the Government service, it should be observed that entrants from

[31] See the preface to *Racial Equality and the Law,* published by UNESCO.
[32] Summarised in *The Times* newspaper, July 8, 1954. The full Report is obtainable from the Crown Agents for Overseas Governments and Administrations.
[33] See *Hansard,* Vol. 531, cols. 53–54.

India, Pakistan and Goa, do not qualify for the inducement allowance, and further that the Kenya Indian Congress has recently expressed fears that the Report may be to some extent nullified by the regrading of posts on racial grounds.[34] It is to be hoped that these fears prove groundless.

The experience of the United States, as reported by Professor Morroe Berger,[35] seems to show that a lead from the Government in its own field of activities, coupled with some measure of anti-discrimination legislation, although it cannot ensure complete equality, may well have far-reaching and beneficial effects on discrimatory practices generally.

However, even if all inequalities before the law between different races within multi-racial dependent territories were completely abolished, and all discrimination within a dependent territory effectively prohibited by law, we, in the United Kingdom would still, in my opinion, not be in a position to proclaim our attachment to the principle of equality before the law, so long as we fail to grant to the peoples of our dependent territories those fundamental freedoms which are so zealously safeguarded by the law of the United Kingdom. So I turn to this topic:

### DENIAL BY COLONIAL LAWS OF RIGHTS RECOGNISED BY ENGLISH LAW

Article 2 of the Universal Declaration of Human Rights, to which this country has subscribed, after providing that every one is entitled to the rights and freedoms set forth in the Declaration without discrimination on grounds of race, colour, etc., continues: 'Furthermore, no distinction shall be made on the basis of the political, jurisdictional, or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self governing or under any other limitation of sovereignty'.

Some differences in the law of the United Kingdom and the law of the overseas dependencies are, of course, inevitable. The law must be designed to meet the social and political consciousness of the people to whom it is being applied if it is to serve its

[34] The Report of the Kenya Indian Congress held at Nairobi on July 31 and August 1 and 2, 1954.
[35] *Loc. cit.*, note 31 above.

proper purpose. However, it does seem important that when praising the particular merits of the British Constitution and the British way of life we should recognise that we do not always concede the same privileges to the inhabitants of our overseas territories, despite our adherence to the Universal Declaration of Human Rights. If it is thought that we cannot extend to our overseas territories those fundamental freedoms so cherished by the law of the United Kingdom, let us not be too ready to condemn independent countries which may well have similar reasons for not extending those freedoms to their subjects.

Perhaps the feature of our Constitution which has been most admired and lauded is the protection afforded to individual liberty by our law—the freedom of speech, of the press, and of the person, which we enjoy in the United Kingdom. How far do we extend these rights to those dependent territories for the laws of which the United Kingdom Government and Parliament is responsible? In a comparison of the British and Soviet Colonial Systems, one writer has stated that the protection of these rights is 'one of the greatest and most lasting gifts which Britain has been able to bestow on the Commonwealth, on Dominion and Colony alike'.[36] Similarly, the Colonial Office have stated in the Survey referred to above[37]: 'All elements of the population of the territory are secure in the enjoyment of human rights and fundamental freedoms without discrimination as to race, sex, language or religion'. Another writer, on the other hand, has stated that, in his opinion, we have in fact adopted a double standard of freedom—a liberal standard for ourselves and a harsher standard for the Colonies.[38] Where does the truth lie as between these two views?

In relation to freedom of speech and of the press, perhaps some indication of the truth of the matter is provided by contrasting the laws of sedition in this country with the laws of sedition in our overseas territories. In this country sedition is a common law offence, defined in Stephen's *Digest of the Criminal Law*[39] as follows: 'A seditious intention is an intention to bring into hatred or contempt, or to excite disaffection against

[36] Kathleen Stahl, *British and Soviet Colonial Systems* (1950), pp. 47–49.
[37] See note 13 above.
[38] See International Press Institute Report summarised in *The Observer*, September 12, 1954.
[39] 9th edition (1950), p. 92.

the person of, Her Majesty, her heirs or successors, or the Government and Constitution of the United Kingdom by law established, or either House of Parliament, or the administration of justice, or to excite Her Majesty's subjects to attempt otherwise than by lawful means, the alteration of any matter in Church or State by law established . . . , or to raise discontent or disaffection amongst Her Majesty's subjects, or to promote feelings of ill-will and hostility between different classes of such subjects'. The Article in Stephen's *Digest* then further provides: 'An intention to show that Her Majesty has been misled or mistaken in her measures, or to point out errors and defects in the government or constitution as by law established, with a view to their reformation, or to excite Her Majesty's subjects to attempt by lawful means the alteration of any matter in Church or State by law established, or to point out, in order to their removal, matters which are producing or have a tendency to produce, feelings of hatred and ill-will between classes of Her Majesty's subjects is not a "seditious intention"'. This definition by Stephen of the common law offence of sedition in the United Kingdom is adopted, more or less verbatim, with the substitution of appropriate words to protect the Colonial Government instead of the United Kingdom Government, in the Criminal Procedure Codes of almost all our colonies. On the face of the law, therefore, there appears to be no difference between the law of sedition in the United Kingdom and the law of sedition in its overseas dependencies, and there cannot, I think, be much room for doubt that the drafters of the colonial codes intended, in adopting Stephen's definition, to reproduce in the colonies the sedition laws of the United Kingdom. However, there is, in fact, a vital distinction.

In the United Kingdom, as is well known, the courts have held that sedition involves a further element, namely, the intention to excite violence,[40] although no mention of this element appears in the definition in Stephen's *Digest*. In relation to the Colonies, however, the Judicial Committee of the Privy Council has held[41] that no such intention to excite violence is required, unless the Criminal Code of the Colony expressly so stipulates,

[40] See *R.* v. *Burns* (1886) 2 T.L.R. 510; *R.* v. *Aldred* (1909) 22 Cox C.C. 1; *R.* v. *Caunt* (1947) *The Times* newspaper, November 18, 1947, and (1948) 64 *Law Quarterly Review*, p. 203.

[41] *R.* v. *Wallace-Johnston* [1940] A.C. 231; [1940] 1 All E.R. 241.

and, so far as I have been able to discover, no Colonial Criminal Code does, in fact, expressly do so. The Colonial Criminal Code, according to the Judicial Committee, 'must be considered free from any glosses or interpolations derived from any exposition, however authoritative, of the law of England or Scotland'. This, of course, makes a vital difference to freedom to criticise the Government. And this may be made even more pronounced by the differences in the mode of trial—the safeguard of trial by jury in the United Kingdom and its absence in some of our overseas territories. The value of a jury in cases involving freedom to criticise the Government has recently been stressed by Lord Justice Denning in *Freedom under the Law.* 'Freedom of mind and conscience', he writes, 'depend on the tribunals which decide upon it'.[42] And he remarks that 'even when judges are independent they may not always see clearly on a question of freedom of speech because of their own predilections on the matter in hand. This is where the value of a jury is most clearly seen'.[43] But that safeguard, so important apparently in political cases in this country, and even more important, one would have thought, where the judge usually belongs to an alien race and holds office at the pleasure of the Crown,[44] is denied in many of our overseas territories. The effect of the differences in the requirement of the intent to excite violence and in the mode of trial is well brought out by contrasting the United Kingdom cases of *R.* v. *Burns*[45] and *R.* v. *Caunt*[46] with the colonial case of *R.* v. *Wallace-Johnston.*[47] In *R.* v. *Burns* the accused, despite the use of such expressions as 'Unless we get bread, they must have lead', and 'We have shown them what we can do with stones and unless they do something for us we will show them what we can do with powder and shot', and despite the actual occurrence of violence after his speeches, was found by the jury to have had no intention of exciting violence and, accordingly, not guilty of sedition. Similarly, in *R.* v. *Caunt,* the accused, despite the strong language which he used in an article criticising British Jewry,

[42] Sir Alfred Denning, *Freedom under the Law* (1949), p. 36.
[43] *Ibid.,* p. 38.
[44] See *Terrell* v. *Secretary of State for the Colonies* [1953] 2 All E.R. 490.
[45] (1886) 2 T.L.R. 510.
[46] (1947) *The Times* newspaper, November 18, 1947.
[47] [1940] A.C. 231; [1940] 1 All E.R. 241.

ending with the words 'Violence may be the only way to bring them to the sense of their responsibility to the country in which they live', was found by the jury to have had no intention of exciting violence and so was acquitted of sedition.[48] In *R.* v. *Wallace-Johnston,* on the other hand, the words in question , published in the Gold Coast, contained no mention of violence at all,[49] and no violence in fact resulted, but the accused was, nevertheless, found guilty of sedition by the judge who tried the case, the opinions of two Gold Coast assessors to the contrary being disregarded, and this conviction was upheld on appeal to the West African Court of Appeal and the Judicial Committee. One may comment that the privilege of pointing out errors and defects must often be illusory if the intention to excite violence need not be proved, since the dispassionate pointing out of errors may well excite hatred and contempt against those responsible for them. And the more grievous the error or defect, the more likely it is that hatred and contempt will be excited.

Differences in the ingredients of the law of sedition coupled with differences in the mode of trial would in themselves seem to involve a severe limitation on freedom of speech in the colonies as compared with the United Kingdom. This is further accentuated by the nature of the penalties for sedition under Colonial legislation, for in some colonies conviction on a sedition charge may involve not only imprisonment, but also prohibition of the newspaper concerned and confiscation of the printing presses. Recent illustrations of the operation of these provisions have occurred in Uganda[50] and Zanzibar.[51] It is interesting to observe that since the recent publicity provoked by the operation of the sedition laws in Cyprus, the Secretary of State for the Colonies has announced that he has invited the Governor of Cyprus to consider repeal of the provision empowering the suspension of newspapers convicted of seditious libel in that

[48] For comments on this case, see a note by Professor E. C. S. Wade in (1948) 64 *Law Quarterly Review,* p. 203.

[49] The tenor of the article in question may perhaps be gathered from the following extract: 'In the Colonies the European believes in the God that commands "Ye administrators make Sedition Bill to keep the African gagged. Make Forced Labour Bill to work the Africans as slaves. Make Deportation Bill to send the Africans to exile whenever they question your authority" '.

[50] See *Hansard,* Vol. 531, cols. 51–52, and *The Times* newspaper, July 5, 1954.

[51] See *The Times* newspaper, September 14, 1954.

country.[52] It is difficult to resist the conclusion that only publicity has brought about this suggestion of a reform which is equally desirable in other colonies the sedition laws of which have unfortunately not received the same publicity. But the sedition laws, though the chief, are by no means the only restriction on freedom of speech and press in our overseas dependencies. In all except five colonies, the Government also controls the press through compulsory registration of newspapers or printing presses, and sometimes through the requirement of a bond to cover possible fines. In Malta the law even controls the appointment of newspaper editors. In Aden, Hong Kong, Singapore and Malaya a licence is required to print, publish or edit a newspaper. In most colonies the Governor in Council is also empowered to prohibit the importation of undesirable publications. A typical example is section 53 of the Penal Code of Northern Rhodesia which empowers the Governor-in-Council *in his absolute discretion* to prohibit the importation of any publication which he considers prejudicial to the public interest, and which further empowers all manner of officials to detain, open and examine postal packets to ensure that no breach of any such prohibition is taking place. As a necessary corollary of the prohibition on the import of any literature, the possession of such literature by any person within that colony is made an offence.[53] In British Guiana the Undesirable Publications (Prohibition of Importations) Ordnance, 1953, which makes similar provision for prohibiting and controlling the import of literature, did not come into force until February 27, 1953, but nevertheless retrospectively legalises any openings of postal packets which might have taken place since February 1, 1952. The attempt of Dr. Jagan to abolish the power to ban the importation of literature was, of course, one of the grounds for suspending the Constitution in British Guiana.[54]

Just as with freedom of speech and freedom of the press, so with other freedoms, such as freedom of the person, many differences are found between the law of the United Kingdom

[52] See *The Times* newspaper, October 29, 1954.

[53] See, for example, the case of J. Sachmansingh, reported in *The Times* newspaper, August 11, 1954, who was fined $30 for being in possession of a book entitled 'The World Trade Union Movement'; the accused's naïve plea that every one has the right to read whatever he wishes was summarily rejected.

[54] Cmd. 8980 of 1953, p. 4.

and the laws of our overseas dependencies. One difference affecting personal freedom is the power of deportation and 'rustication' (as the Colonial Office euphemistically call it). There is, of course, no power to deport a British subject from the United Kingdom, or to 'rusticate' him, that is, restrict him to some remote part of the country.[55] In the Colonies, however, such powers seem to be regarded as essential. A typical example of such a power is found in section 34 of the Northern Rhodesian Penal Code, under which a subordinate court, subject to review by the High Court, or the High Court subject to review by the Governor, may order the deportation outside Northern Rhodesia or to another part of Northern Rhodesia of any person whose conduct is dangerous to peace and good order or who is intriguing against constituted authority. Such powers exist in some Colonies even without the safeguard of a judicial review. Most of the criticisms of these powers of deportation and rustication in the Colonies have centred on the need for a judicial inquiry before such orders are made.[56] But even if this were universally required, there would still be inequality as between the Colonies and the United Kingdom in the very existence of the powers. It is interesting to observe that when Mr. Fenner Brockway recently moved for leave to bring in a Bill in the House of Commons[57] to prohibit the deportation or rustication of any British subject or British Protected Person from a Colony, Protectorate or Trust Territory without preceding trial, it was opposed by Mr. Hylton Foster (now Sir Harry Hylton Foster) on the grounds that for the United Kingdom Parliament to pass such a Bill would be inconsistent with the progress of the Colonies towards self-government, since such legislation was within the proper province of the colonial legislature. In view of this expression of opinion, one might have expected the speaker to have been amongst the most vehement opponents of the recent suspension of the Constitution of British Guiana and the recent deportation of the Kabaka, but this does not appear to have been the case.

In this paper I have been able to discuss only a few of the

[55] Unless, of course, an offence is proved against him and conditions are imposed by virtue of a probation order or conditional discharge.

[56] See, for example, *Hansard,* Vol. 518, cols. 1298 *et seq.*, and Vol. 528, cols. 85–86 and 141–142.

[57] See *Hansard,* Vol. 518, cols. 1298 *et seq.*

many flagrant examples of inequality before the law in British dependencies.

Whether these inequalities are justifiable or not is a matter on which there may well be differences of opinion, but whatever our opinions on the matter, let us at any rate frankly recognise that equality before the law and the fundamental freedoms to which Dicey gave so much stress, are at the present time principles of very limited application when considered in relation to the whole area for which the United Kingdom Government and Parliament is responsible.

Our record in this matter may well compare favourably with that of other colonial powers, but so long as such inequalities before the law exist in territories for the law of which the United Kingdom Government and Parliament is ultimately responsible, it ill becomes us to indulge in ready condemnation of similar limitations on personal freedom imposed by other Governments. 'First cast out the beam out of thine own eye and then shalt thou see clearly to cast out the mote out of thy brother's eye'.

# 6

# CONFLICT OF INTEREST AND DUTY

O. R. Marshall

In *Meinhard* v. *Salmon*[1] Chief Justice Cardozo, speaking for the New York Court of Appeals, made the following observations: 'Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honour the most sensitive, is then the standard of behaviour. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court'. This statement emphasises the fact that in the administration of a trust it is the duty of a trustee to prefer the interests of the beneficiaries to his own, and that wherever there is a risk of conflict between the trustee's self-interest and his duty to the beneficiaries, the policy of the law is directed to removing the risk by imposing an absolute requirement upon him to act in accordance with his duty. The rule is not confined to trustees but applies to other fiduciaries as well—guardians, personal representatives, receivers, agents, company directors and partners, though, perhaps, it applies to these with a lesser degree of intensity than it does to trustees. Nor is the rule confined in scope to private law, but applies as well to public and international law. Nor is it a rule of the common law alone, for the area of its operation takes in the civil law. Thus in the American case of *Michoud* v. *Girod*[2] executors sold land of the testator at public auction to a person acting on their behalf who later reconveyed it to them. The land was situated in Louisiana, a civil law country, where

[1] (1928) 249 N.Y. 458 at 464.
[2] (1846) 4 How. 503 (U.S.).

the testator was domiciled. The Court held that the sale would be set aside even though it was made in good faith and at a fair price, for the rule that a fiduciary could not purchase for his own account property entrusted to him as fiduciary was not confined to the English common law, but prevailed in the civil law as well, based as it was on a general principle of policy and morality which forbade a fiduciary to place himself in a situation where there was a conflict between his self-interest and his duty to others.[3]

In English law this general principle has given rise to a number of particular rules the scope and application of which must be examined. First, as to the private law.

It is now a commonplace that trustees and other fiduciaries are not allowed to put themselves in a position where their interest and duty conflict.[4] This general principle gives rise to a number of positive rules.

First, trustees must not purchase trust property from themselves without the consent of the beneficiaries, but they have a limited right to purchase with the consent of the beneficiaries or with the approval of the Court. One of the earliest cases is *Whichcote* v. *Lawrence*,[5] in which trustees for creditors sold trust property at an auction to one of themselves who later resold it at a profit, for which he was held to be accountable. The case contains a dictum that if he had not made a profit the sale would not have been set aside, but this is not supportable in view of later decisions, notably *Campbell* v. *Walker*,[6] in which a similar sale was set aside even though it was made at a fair price. The rule appears to be the same in America.[7] The prohibition against purchase by the trustee applies whether or not he himself fixes the price. Thus in *Wright* v. *Morgan*,[8] a testator left land on

[3] The existence of the principle in Roman law is well evidenced. Thus a guardian was not permitted to buy his ward's property, and this was later applied to curators and other fiduciaries. D.18.1.34.7. But unlike English law a guardian could purchase from his co-guardian if he acted in good faith. D.26.8.5.2. See also D.26.8.5.5 and 6 and the Scottish case of *Governor and Company of Undertakers* v. *Mackenzie* (1795) 8 Bro.P.C. 42.

[4] *Bray* v. *Ford* [1896] A.C. 44 at 51.

[5] (1798) 3 Ves. 740.

[6] (1800) 5 Ves. 678; (1807) 13 Ves. 601.

[7] *Davoue* v. *Fanning* (1816) 2 Johns Ch. 252 and *Michoud* v. *Girod* (1846) 4 How. 503 (U.S.).

[8] [1926] A.C. 788.

trust for sale and provided that it should be offered at a price to be fixed by valuers to one of his sons, X, who was one of the trustees. X assigned his right of pre-emption to his brother, Y, who later became one of the trustees but who was not authorised to purchase by the terms of the will. Y purchased at a price fixed by the valuers, and it was held that the sale could be set aside. The prohibition is applicable where the sale is conducted at an auction held by the trustee himself,[9] since the trustee is in a position to discourage bidders. Further, where the sale is conducted not by the trustee but by a third party, as, for example where a trustee holds trust property subject to a mortgage and the mortgagee sells under his power of sale, the trustee is nevertheless not allowed to buy the property, since to hold otherwise might be to permit him to prefer his own interest to his duty,[10] and this is so whether or not he could have prevented the sale.[11] The rule is a strong one and is not circumvented by the device of the trustee selling to a third party to hold on trust for him.[12] But if there is no prior agreement and the sale is in all respects bona fide there is no objection to the trustee subsequently buying the trust property from the person to whom he sold it,[13] though if the trustee contracts to sell the property to X, a stranger, and before the conveyance is made he purchases the benefit of the contract from X, the contract can be set aside.[14] Further, if the trustee has retired from the trust with a view to purchasing the property the sale can be avoided,[15] but it is otherwise if at the date of his retirement he had no idea of making the purchase, unless the circumstances show that when he made the purchase he used information acquired by him while a trustee.[16] But a trustee who has disclaimed is not caught by the rule.[17] Nor is a trustee who had an option to purchase the property before being

[9] *Whelpdale* v. *Cookson* (1747) 1 Ves.Sen. 9; stated from the Register's Book in *Campbell* v. *Walker* (1800) 5 Ves. 678 at 682.

[10] A. W. Scott, 'The trustee's duty of loyalty' (1936) 49 *H.L.R.*, p. 521, at pp. 529–530.

[11] *Griffith* v. *Owen* [1907] 1 Ch. 195, where it was held that the father of an infant entitled in remainder to an equity of redemption could not purchase the property for himself from the mortgagee selling under his power of sale.

[12] *Michoud* v. *Girod* (1846) 4 How. 503 (U.S.).

[13] *Re Postlethwaite* (1888) 37 W.R. 200.

[14] *Williams* v. *Scott* [1900] A.C. 499.

[15] *Wright* v. *Morgan* [1926] A.C. 788.

[16] *Re Boles and British Land Co's Contract* [1902] 1 Ch. 244.

[17] *Stacey* v. *Elph* (1833) 1 Myl. & K. 195.

appointed a trustee.[18] And special provision is made to enable a tenant for life to purchase settled land.[19]

Moreover the rule is sufficiently strong and elastic to prevent a trustee from selling the trust property to a company of which he is the principal shareholder,[20] managing director or other principal officer,[21] or to a partnership of which he is a member.[22] Further, the rule applies to trustees, whether individual or corporate, so that a trust corporation cannot in the absence of authorisation by the trust instrument or consent of the beneficiaries or approval of the Court sell the trust property either to itself or to its subsidiaries.[23]

Where a sale takes place in breach of the rules outlined above the beneficiaries have a number of remedies open to them. Thus they may claim any profit made by the trustee on a resale of the property. If the property has not been resold they can insist on a reconveyance or alternatively they can demand that it be offered for sale again. If on this occasion a higher price is bid than that which the trustee paid, it will be sold at that price. If not the trustee may at the option of the beneficiaries be allowed to retain the property, and in the nature of things the beneficiaries will confer this doubtful favour upon him where the property has fallen in value since he purchased it. The right which the beneficiaries have to avoid the sale is an equitable one, and as such is liable to be lost through *laches,* but for *laches* to apply the beneficiaries must have full knowledge of the facts and must acquiesce in the situation for an unreasonably long period. Further, the right to have the sale set aside may be lost if the Court in the exercise of its inherent jurisdiction sets the seal of its approval on the transaction, and it seems that not only may the Court authorise a sale which is about to take place, but in a

[18] *Re Mulholland* [1949] 1 All E.R. 460.

[19] By section 68 of the Settled Land Act, 1925. Sale to a trustee's wife is risky (see *Ferraby* v. *Hobson* (1847) 2 Ph. 255 at 261) but perhaps not absolutely prohibited (see *Burrell* v. *Burrell's Trustees* [1915] S.C. 33; (1949) 13 Conv. N.S. 248).

[20] *Silkstone & Haigh Moor Coal Co.* v. *Edey* [1900] 1 Ch. 167; *Farrar* v. *Farrars Ltd.* (1888) 40 Ch.D. 395.

[21] *Eberhardt* v. *Christiana Window Glass Co.* (1911) 9 Del.Ch. 284.

[22] *Colgate's Executor* v. *Colgate* (1873) 23 N.J.Eq. 372.

[23] *Purchase* v. *Atlantic Safe Deposit and Trust Co.* (1913) 81 N.J.Eq. 344. *Quaere* whether a trust corporation can sell trust property to another corporation of which the directors are also directors of the trust corporation. See *Shanley* v. *Fidelity Union Trust Co.* (1927) 108 N.J.Eq. 564; cf. *Loud* v. *St. Louis Union Trust Co.* (1926) 313 Mo. 552.

suitable case it may ratify one which has already occurred.[24]

The above presupposes that the sale has taken place without the consent of the beneficiaries. Where, however, the beneficiaries are *sui juris* they may authorise the sale, which will then stand, provided that the trustee made a full disclosure, and did not induce the sale by taking advantage of his relation to the beneficiaries or by other improper conduct, and the transaction was in all respects fair and reasonable.[25] The onus of proof is on the trustee to show affirmatively that these conditions existed, but there is no objection to consent of the beneficiaries being obtained after the sale to the trustees.[26]

Secondly, trustees must not sell their own property to the trust. The leading case on this situation is the American one of *Cornet* v. *Cornet*,[27] in which the defendant was a trustee of several trusts and was in the habit of buying securities in his own name and afterwards allocating them to the various trusts at cost. The securities were of the type authorised for the investment of trust funds, but in one case they depreciated in value. It was held that the trustee was accountable for the loss, for if the rule were otherwise 'it would place before him the constant temptation to make the trust fund a dumping ground for his own unsatisfactory ventures'.[28] The rule prevents the trustee from making such a sale not only when he has an absolute interest in the property sold, but also when he has a qualified interest which is sufficiently substantial to affect his judgment in making the sale, as for example, where the property sold was owned by a company of which he was the principal shareholder or officer, or by a partnership of which he was a member.[29] Further, it applies to all trustees whether corporate or individual, thus preventing a trust corporation from investing trust funds in securities owned by itself.[30]

[24] *Farmer* v. *Dean* (1863) 32 Beav. 327; *Campbell* v. *Walker* (1800) 5 Ves. 678.
[25] *Coles* v. *Trecothick* (1804) 9 Ves. 234; *Morse* v. *Royal* (1806) 12 Ves. 355; *Gibson* v. *Jeyes* (1801) 6 Ves. 266; cf. *Fox* v. *Mackreth* (1788) 2 Bro.C.C. 400.
[26] See T. B. F. Ruoff: 'Purchases in Breach of Trust: A Suggested Cure' (1954) 18 *Conv. N.S.*, p. 528 *et seq.*
[27] (1916) 269 Mo. 298.
[28] *Ibid.*, at p. 322.
[29] *Birmingham* v. *Wilcox* (1898) 120 Cal. 467; *First Trust Co.* v. *Exchange Bank* (1934) 126 Neb. 856.
[30] *Kelly* v. *First Minneapolis Trust Co.* (1929) 178 Minn. 215.

Thirdly, trustees must not deal with the trust property in such a way as to make for themselves a profit out of it or out of their dealings with it. Thus in *Aberdeen Town Council* v. *Aberdeen University*,[31] it was held that trustees who by virtue of their position as legal owners of the trust property had acquired a Crown grant of salmon-fishings opposite the trust property must hold the fishings as trustees and not beneficially. Lord Cairns, L.C., observed in the course of his speech[32]: '. . . it is one of the first principles in regard to the doctrine of trusts—a principle founded upon no technical rule of law, but upon the highest principles of morality—that wherever a trustee, being the ostensible owner of property, acquires any benefit as the owner of that property, that benefit cannot be retained by himself but must be surrendered for the advantage of those who are beneficially interested'. So too in *Sugden* v. *Crossland*,[33] a testator by codicil substituted X and Y as trustees in place of A and B whom he had appointed by will. After the testator's death A paid X £75 as an inducement to retire and appoint him as trustee in his place. It was held that not only must the transaction be set aside but also that the £75 must form part of the estate as a profit illegally made by the trustee who retired. Further, if a trustee uses trust funds in his own business he must bear any losses which occur, but must hand over any profit to the beneficiaries, or alternatively pay interest on the sum used. In this connection the curious case of *Re Waterman's Will Trusts*[34] is most instructive. There a testator authorised a bank, which he appointed his executor and trustee, to make such charges for its services as if it were rendering them to any of its ordinary customers. On the testator's death the bank kept the trust fund on deposit with itself for about 18 months at ½ per cent interest instead of investing it as it was by law required to do. The result of this low interest yield was that when the time came for distribution of the estate there was insufficient money to pay all the legacies in full. Hence the matter came before the judge in chambers in the first instance on the question how the legacies were to abate. But when the judge

[31] (1877) 2 App.Cas. 544.
[32] *Ibid.*, at p. 549.
[33] (1856) 3 Sm. & Giff. 192.
[34] [1952] 2 All E.R. 1054.

heard the facts he adjourned the case into open court and invited the legatees to charge the bank with breach of trust and with the profit it must be deemed to have made by keeping the money on deposit with itself at ½ per cent and using it to earn a great deal more. The beneficiaries, however, refused to attack the bank, and Harman, J., held that in the circumstances he must assume that there was good reason for the bank not having taken steps to invest the money. Accordingly, the bank was not chargeable with the profit which it must be deemed to have made.

The rule against making a profit out of dealings with the property is not confined to trustees but is equally applicable to other fiduciaries. Thus company directors are prohibited from entering into beneficial contracts with the company,[35] and company promoters are not allowed to retain a secret commission received from the vendors of property which the company was formed for the purpose of acquiring.[36] Further, directors cannot receive commission from other parties on the sale of any of the property of the company[37] and, in general, cannot deal for their own advantage with any part of the property or shares of the company.[38] And the discrimination against self-interest persists not only during the continuance of the fiduciary relationship but also for a reasonable time after it has ceased.[39]

The fiduciary is liable to account for profits whether directly or indirectly made, but in the latter case it must be shown that the fiduciary relationship was the dominant factor in the acquisition of the profit. This is amply illustrated by a number of cases in which trustees of shares became directors of the companies in which the shares were held. Thus in *Re Francis,*[40] Kekewick, J., refused to allow the trustees to retain directors' fees since these were procured by the use of the voting powers attached to the trust shares. On the other hand, in *Re Dover Coalfield Extension Ltd.,*[41] the trustees were appointed directors of the company *before* they held any trust shares, and so it was held that they were not accountable for their fees, even though they

35 *Aberdeen Railway Co.* v. *Blaikie* (1854) 1 Macq.H.L. 461.
36 *Emma Silver Mining Co.* v. *Grant* (1879) 11 Ch.D. 918.
37 *Gaskell* v. *Chambers* (1858) 26 Beav. 360.
38 *York. Rail. Co.* v. *Hudson* (1853) 16 Beav. 485.
39 *Luddy's Trustee* v. *Pearl* (1886) 33 Ch.D. 500; cf. *Nordisk Insulinlaboratorium* v. *Gorgate Products Ltd.* [1953] Ch. 430.
40 (1905) 74 L.J.Ch. 198.
41 [1908] 1 Ch. 65.

would not have been able to continue as directors without the trust shares.[42] Likewise in *Re Gee*,[43] the trustee would not have prevented his appointment as director even if he had used the trust shares to vote against himself, and he was held not accountable. In *Re Llewellin*,[44] the testator expressly authorised his trustees to use the trust shares to secure their appointment as directors, and it was held that he must be deemed to have authorised them to retain the directors' fees.[45] Further, it appears that trustees will be able to retain profits which come to them without their volition, as where the testator has property both here and abroad, and his executors are entitled by the foreign law to payment for the administration of the foreign part of the estate.[46]

Fourthly, trustees must not purchase an interest in property any interest in which forms part of the trust estate. The leading case is *Keech* v. *Sandford*,[47] in which a trustee of the lease of a market for an infant obtained a renewal of the lease for himself after the lessor had refused to renew in favour of the infant. It was nevertheless held that the trustee must hold the benefit of the renewal on trust for the infant, Lord King remarking rather cynically[48]: . . . 'If a trustee on the refusal to renew might have a lease to himself, few trust estates would be renewed to *cestui que use*'. The rule applies whether the trustee obtains a renewal by virtue of a provision in the lease to that effect or whether he obtains it by virtue of the advantage which his position as sitting tenant gives him.[49] But the rule does not apply to the bona fide purchase by a person in a fiduciary position of the reversion on a lease not renewable by custom or contract.[50] The principle applies not only to trustees and tenants for life,[51] but also to other fiduciaries such as mortgagees,[52] joint tenants,[53]

[42] See also *Re Lewis* (1910) 103 L.T. 495.
[43] [1948] Ch. 284.
[44] [1949] Ch. 225.
[45] Cf. *Re Macadam* [1946] Ch. 73.
[46] *Re Northcote* [1949] 1 All E.R. 442.
[47] (1726) Sel.Cas. Ch. 61; see Hart, 'The Development of the Rule in *Keech* v. *Sandford*', (1905) 21 *L.Q.R.*, p. 258.
[48] (1726) Sel.Cas. Ch. 61 at 62.
[49] *Re Knowles' Will Trusts* [1948] 1 All E.R. 866.
[50] *Bevan* v. *Webb* [1905] 1 Ch. 620; cf. *Phillips* v. *Phillips* (1884) 29 Ch.D. 673.
[51] *James* v. *Dean* (1808) 15 Ves. 236.
[52] *Rushworth's Case* (1676) Freem. Ch. 13.
[53] *Palmer* v. *Young* (1684) 1 Vern. 276.

tenants in common[54] and partners.[55] But unlike trustees and tenants for life the latter group of persons are not irrebuttably precluded from taking the renewal of a lease. Thus in *Re Biss,*[56] a lease formed part of the personalty of an intestate, and after the lessor had refused to renew to the administratrix one of the next-of-kin obtained a renewal for himself. It was held, however, to be unimpeachable, since he could show affirmatively that he acted bona fide and did not take advantage of the other persons interested.

The principle underlying *Keech* v. *Sandford* also prevents a tenant for life of an equity of redemption from purchasing the fee simple from the mortgagee. If he does so he must hold it upon the trusts of the settlement, subject to a charge for what he has paid.[57]

Fifthly, trustees must not enter into competition with the trust. The general rule is that a trustee may not, after accepting a trust which comprises a business, set up a private business which competes or may compete with the business of the trust, otherwise his interest would conflict with his duty. Thus in *Re Thomson,*[58] the testator's estate included a yachtbroker's business which he bequeathed to his executors on trust to continue it. One of the executors claimed the right to set up a similar business in competition with the trust, but the Court granted an injunction to restrain him. On the other hand, in the Irish case of *Moore* v. *M'Glynn,*[59] the Court refused to restrain a trustee from setting up a competing business, but considered that it would be a good ground for removing him from his trusteeship. Chatterton, V.C., observed[60]: 'I have not been referred to, nor am I aware of, any case deciding that an executor or trustee of a will carrying on the business of his testator is disabled from setting up a similar business in the same locality on his own account. . . . I am not prepared to hold that a trustee is guilty of a breach of trust in setting up for himself in a similar line of business in the neighbourhood, pro-

[54] *Kennedy* v. *De Trafford* [1897] A.C. 180.
[55] *Featherstonhaugh* v. *Fenwick* (1810) 17 Ves. 298; cf. *Piddock* v. *Burt* [1894] 1 Ch. 343.
[56] [1903] 2 Ch. 40.
[57] *Griffith* v. *Owen* [1907] 1 Ch. 195.
[58] [1930] 1 Ch. 203.
[59] [1894] 1 Ir.R. 74.
[60] *Ibid.*, at p. 89.

vided that he does not resort to deception or solicitation of custom from persons dealing at the old shop'. Perhaps the distinction between this case and *Re Thomson* is that in the latter the business was highly specialised and the locality was very small so that competition was inevitable whether or not there was solicitation of custom.

Finally, trustees must, in the absence of some special dispensation, administer the trust gratuitously. This rule caused some difficulty in the recent case of *Dale* v. *I.R.C.*[61] The issue in the case was whether Sir Henry Dale's trusteeship of Sir Henry Wellcome's will, for which he received £1,000 a year free of tax so long as he continued to act as trustee, was an office of profit within the meaning of section 14 (3) of the Income Tax Act, 1918. If so he was exempt from the special contribution levied by the Finance Act, 1948. Harman, J., held that the annuity payable to Sir Henry Dale was remuneration from his office of trustee,[62] but the Court of Appeal reversed this on the ground that the remuneration was not remuneration from Sir Henry Dale's office of trustee, but was derived from the bounty of the testator.[63] Sir Raymond Evershed, M.R., observed[64]: 'The office of trustee is . . . an office of honorary service and not an office of profit—so much so, indeed, that if a trustee makes a profit out of his trusteeship he gets into serious trouble'. The House of Lords, however, were unanimous in restoring the decision of Harman, J. Lord Normand had this to say about the decision of the Court of Appeal[65]: 'The learned Master of the Rolls held that a trustee could not be described as the holder of an office of profit because "the office itself involves a denial of any right to make a profit out of its performance". In other words, the receipt of a profit for the performance of the

[61] [1953] 2 All E.R. 671.
[62] [1951] 2 All E.R. 517.
[63] [1952] 2 All E.R. 89.
[64] *Ibid.*, at p. 97; the authorities relied on by the Court of Appeal were *Re Pooley* (1888) 40 Ch.D. 1, *Re Thorley* [1891] 2 Ch. 613 and *Re White* [1898] 2 Ch. 217 which established that if a testator attached remuneration to a trusteeship that remuneration was, as between the trustee and the estate, bounty, liable to legacy duty while that duty was leviable and postponed to the claims of creditors if the estate was insolvent, but they did not decide that as between the trustee and a third party such as the Inland Revenue the office of trustee was an honorary one and not an office of profit: see Lord Normand [1953] 2 All E.R. 671 at 674; Lord Cohen, *ibid.*, at p. 678.
[65] [1953] 2 All E.R. 671 at 674.

duties of a trustee is repugnant to the nature of trusteeship. My Lords, it is with regret that I feel constrained to differ from the Master of the Rolls, but I think that he has here incorrectly described the fiduciary duty of trustees. The fiduciary duty may arise, not only from trust, but also *ex lege* and *ex conventione*. The duty was recognised by the civil law, and it is, I think, acknowledged in the jurisprudence of all civilised communities. The duty is, to use the Latin phrase, that the person subject to it must not become *auctor in rem suam*. It applied to tutors and curators in the civil law, and it applies to tutors and curators in the Scots law. It applies also to judicial factors appointed by the Courts in Scotland, and to partners and to agents under a contract of agency, and, of course, to trustees under a settlement or under a will. That by no means exhausts the area of its operation, but for illustrative purposes the examples I have given will suffice. Some who are subject to the duty are never entitled to remuneration; some are *ex lege* entitled to payment for their services; some are entitled to payment *ex conventione*; and some are entitled to payment if the settlor or testator so directs. The rule is the same for all: it is not that reward for the services is repugnant to the fiduciary duty, but that he who has the duty shall not take any secret remuneration or any financial benefit not authorised by the law, or by his contract, or by the trust deed under which he acts, as the case may be. In England, moreover, the court has power to order payments to be made to trustees for whom the truster has made no such provision, a power which it is difficult to reconcile with a general principle that remuneration is repugnant to trusteeship'. There can be no doubt about the correctness of Lord Normand's views of the office of a trustee, but there remain to be considered the cases in which the trustee is entitled to payment for his services.

First, in a suitable case the Court has an inherent jurisdiction to authorise a trustee to receive remuneration. In order to do so the Court must be satisfied that the services of the trustee will be of exceptional benefit to the estate.[66] There appears to be some doubt as to whether the Court can authorise remuneration for

[66] *Marshall* v. *Holloway* (1820) 2 Swans. 432; *Re Freeman* (1887) 37 Ch.D. 148; *Re Masters* [1953] 1 W.L.R. 81; *Re Macadam* [1946] Ch. 73.

past services as undoubtedly it can for future services.[67] Further, the Court, when appointing a *corporation* (other than the Public Trustee) to act, has a statutory jurisdiction under section 42 of the Trustee Act, 1925, to authorise it to charge for its services.

Secondly, if the settlement authorises the trustee to charge for his services he is entitled to be paid, but charging clauses are construed strictly in the sense that the onus is on the trustee to show that the charge which he proposes to make is covered by the terms of the settlement. Thus if a solicitor-trustee is authorised to make 'professional charges', even where the words 'for his time and trouble' are added, he will not be allowed to charge for time and trouble expended other than in his position as solicitor.[68] But where a will authorises the solicitor-trustee to make 'the usual professional or *other proper and reasonable* charges for all business done and time expended in relation to the trusts of the will, *whether such business is usually within the business of a solicitor or not,*' the solicitor is permitted to charge for business not strictly of a professional nature transacted by him in relation to the trust,[69] though, apparently, not for work altogether outside his professional vocation.[70]

Thirdly, if the beneficiaries are all *sui juris* and between them absolutely entitled to the trust estate, they may authorise the trustee to be paid. But such agreements are closely scrutinised by the Courts and in *Ayliffe* v. *Murray,*[71] the agreement was set aside because it was not entered into before the trustee had begun to administer the trust.

Fourthly, the general rule of gratuitous service is particularly severe in the case of solicitor-trustees. Thus in *Christophers* v. *White,*[72] it was held that a solicitor-trustee's firm was not entitled to charge for professional services rendered to the trust by a partner in the firm even though the partner was not one of the trustees.[73] But where a solicitor-trustee employed his partner, as distinct from his firm, under an *express* agreement that the partner should be individually entitled to charges, these were allowed on the ground that where such an agreement is carried

[67] Cf. (1820) 2 Swans. 432 at 435 with (1887) 37 Ch.D. 148 at 152.
[68] *Re Chapple* (1884) 27 Ch.D. 584.
[69] *Re Ames* (1883) 25 Ch.D. 72.
[70] *Clarkson* v. *Robinson* [1900] 2 Ch. 722.
[71] (1740) 2 Atk. 58.
[72] (1847) 10 Beav. 523.
[73] See also *Re Gates* [1933] Ch. 913 and *Re Hill* [1934] Ch. 623.

out there is no infringement of the rule that a trustee may not make his office a source of remuneration.[74] Moreover, the severity of the rule has been relaxed by the case of *Cradock* v. *Piper*,[75] in which a solicitor-trustee acted as solicitor for himself and his co-trustees in legal proceedings relating to the trust, and was held to be entitled to his usual charges. The rule is that unlike a sole trustee acting as solicitor to the trust, a solicitor-trustee acting in legal proceedings[76] for a body of trustees, of whom he himself is one, is entitled to his usual charges if the fact of his appearing for himself and his co-trustees jointly has not increased the costs which would have been incurred if he had appeared for those co-trustees only.

Fifthly, where the trust property is situate abroad and the law of the foreign country permits payment, the trustee is entitled to keep any remuneration which he has received. Thus in *Re Northcote*,[77] a testator who left assets both in this country and in U.S.A. died domiciled in England, and the principal forum of administration was therefore English. The executors took out an English grant, and on doing so they were put on terms by the Revenue, the English effects being insufficient to pay the English duty, to undertake themselves personally to obtain a grant in New York in respect of the American assets. In due course they obtained such a grant, and got in the assets. Under the law of New York they were entitled to commission for so doing, and Harman, J., held that they were under no duty to account for it to the beneficiaries.

The position of fiduciaries provides the most important illustration in private law of the principle that, where interest and duty conflict, interest must be subordinated to duty; but it does not completely exhaust the scope of its operation, for the principle is no less evident in the sphere of public law.

Here a number of disqualifications attach to public servants which illustrate the law's discrimination against self-interest. Thus by the House of Commons Disqualification (Declaration of Law) Act, 1931, it is provided that persons who hold contracts for the furnishing or providing of money to be remitted

74 *Clack* v. *Carlon* (1861) 30 L.J.Ch. 639.
75 (1850) 1 Mac. & G. 664.
76 Legal proceedings need not necessarily be litigation but may be friendly proceedings in Chambers: *Re Corsellis* (1887) 34 Ch.D. 675.
77 [1949] 1 All E.R. 442; see also *Chambers* v. *Goldwin* (1802) 9 Ves. 271.

abroad, or wares and merchandises to be used or employed in the service of the public, shall be disqualified from membership of the Commons. Before this Act it was thought that the area of disqualification was wider.[78] Any person who is disqualified incurs a penalty of £500 for every day in which he sits or votes. Further, even if a person is not disqualified from membership of the House by the above statutes, he is disqualified from voting on a matter in which he has a direct pecuniary interest.[79]

It was formerly a disqualification for service in local government for a person to hold contracts for or on account of the public service.[80] But section 76 of the Local Government Act, 1933, provided that the holding of any direct or indirect interest in any contract or proposed contract or other matter[81] shall not be an absolute disqualification for service, but shall only require the person concerned to disclose his interest and prevent him from discussing or voting on the issue in question.[82] This has been slightly modified by section 131 of the Local Government Act, 1948, which provides that where the interest is indirect or exists solely through ownership of a small fraction of the shares in a company, the duty to disclose remains, but there is no prohibition against engaging in discussion or voting.

Further, it must not be forgotten that Crown servants, both civil and military, owe a fiduciary duty to their employer, and if they make a secret or illegal profit they must account for it. Thus in *Reading* v. *Att.-Gen.*,[83] a sergeant in the army stationed at Cairo on several occasions accompanied the driver of a lorry through that city while wearing his uniform. This was done for the purpose of avoiding inspection by the civilian police. For this service he received large sums of money which were later confiscated by the military authorities. He brought a petition of right for the recovery of the money, but his claim was dismissed by Denning, J., in the court of first instance,[84] by the Court of

[78] House of Commons (Disqualification) Acts, 1782 and 1801.
[79] Erskine May, *Parliamentary Practice*, 15th ed. (1950), p. 418 *et seq.*
[80] *Lapish* v. *Braithwaite* [1926] A.C. 275.
[81] This covers a person whose spouse, partner or employee holds such a contract as gives rise to the disqualifications.
[82] Beneficial interests in stock or shares of a contracting company are deemed to be a disqualifying interest. Interests have to be disclosed to the clerk of the authority who is under a duty to keep a record of disclosures.
[83] [1951] A.C. 507.
[84] [1948] 2 K.B. 268.

Appeal,[85] and by the House of Lords.[86] There was much inconclusive discussion about the basis on which to put the servant's liability to account—whether it was to be based on an implied promise to hand over the illegal gain or on the broader principle of unjust enrichment—but there was positive approval in each court for the rule that the fiduciary must account to his master for the ill-gotten gain he has made out of his fiduciary relationship.

Finally let me turn to international law. Since international law is to a large extent founded on principles of morality it is to be expected that there would exist a general prohibition against action taken by states in their own interest and in disregard of their duty. And in this case expectation is not entirely unfounded. Thus after the first World War civilised states began to show a great deal of concern for the well-being and development of peoples not yet able to govern themselves. This manifested itself in the Mandate system after the first World War and in the Trusteeship system and the Declaration concerning non-self-governing territories after the Second. Neither in the Mandate nor the Trusteeship system is there any express stipulation that the mandatory or trustee, as the case may be, should not place himself in a position where his interest and duty conflict, but there are a number of positive obligations imposed on the mandatory or trustee which come near to it. Thus both systems impose a duty to promote the well-being of the indigeneous population with a view to their ultimate self-government or independence, and both systems contain prohibitions against discrimination. But the trusteeship system is an advance on the other in that it provides for a greater degree of accountability on the part of the trustee by means of petitions from and visits to the trust territory. Nevertheless, as one would expect, the degree of accountability of the trustee in international law is not as great as that of his counterpart in municipal law. The Charter of the United Nations itself recognises this by providing in Article 76 that the objective of self-government should be such 'as may be appropriate to the particular circumstances of each territory and its peoples', and by requiring in Article 79 that the terms of trusteeship for each territory shall be agreed upon by

[85] [1949] 2 K.B. 233.
[86] [1951] A.C. 507.

the States directly concerned.[87] But there can be little doubt that the concept of trusteeship with its requirement of strict accountability is destined to play a large part in international law. Let me conclude by quoting from the separate opinion of Sir Arnold McNair on the status of South-West Africa[88]: 'The trust has frequently been used to protect the weak and the dependent, in cases where there is "great might on the one side and unmight on the other", and the English courts have for many centuries pursued a vigorous policy in the administration and enforcement of trusts. There are three general principles which are common to all these institutions [*i.e.*, trust, *tutela* and *cura*]:

'(a) that the control of trustee, *tuteur* or *curateur* over the property is limited in one way or another; he is not in the position of the normal complete owner who can do what he likes with his own, because he is precluded from administering the property for his own personal benefit;

'(b) that the trustee, *tuteur* or *curateur* is under some kind of legal obligation, based on confidence and conscience, to carry out the trust or mission confided to him for the benefit of some other person or for some public purpose;

'(c) that any attempt by one of these persons to absorb the property entrusted to him into his own patrimony would be illegal and would be prevented by the law. These are some of the general principles of private law which throw light upon this new institution and I am convinced that in its future development the law governing the trust is a source from which much can be derived'.

[87] Thus the U.S. trusteeship of the former Japanese Mandated Islands permits commercial discrimination in favour of American Nationals: see Goodrich and Hambro, *Charter of the United Nations*, 2nd ed. (1949), p. 81.

[88] Advisory opinion of the I.C.J. on *International Status of South West Africa, I.C.J. Reports, 1950*, p. 100.

# 7

# THE DEFINITION OF CRIME

GLANVILLE WILLIAMS

## THE NEED FOR DEFINING CRIME

THE definition of crime has come to be regarded as one of the thorny intellectual problems of the law. Kenny examined eight distinct definitions and rejected all save one; but his own choice is now generally cast aside. The efforts of later writers have ended in notable disagreement.

Is the effort worth making? The answer is that lawyers must try to clarify the notion of 'crime', because it suffuses a large part of the law. For example: there is generally no time limit for criminal proceedings, whereas civil proceedings become statute-barred after a certain time. Criminal and civil proceedings are commenced differently, and often in different courts. A criminal prosecutor generally need not be the victim of the wrong, and a private criminal prosecutor is for many purposes not regarded as a party to the proceedings; he is certainly not 'master' of the proceedings in the sense that he can drop them at will; these rules are different in civil cases. The law of procedure may generally be waived in civil but not in criminal cases. There are many differences in the law of evidence, and several in respect of appeal. Generally, no appeal lies from an acquittal of a criminal charge, but an unsuccessful plaintiff in civil proceedings has a right of appeal. The Court of Appeal has no criminal jurisdiction. The prerogative of mercy is confined to criminal cases. Criminal prisoners are treated differently from civil prisoners. There are differences in respect of the writ of habeas corpus. All these and other procedural rules show that we have under discussion one of the great primary distinctions of the law.

It is true that in the instances given the immediate task is not to define the word 'crime' but to define a criminal charge or proceeding. However, the two enquiries are substantially the same. When we speak of a criminal prosecution, we do not mean



X Note Criminal Justice Act 1967.

that it is criminal to start the prosecution. What we mean is that the prosecution is in respect of a crime. In the language of grammarians, 'criminal proceeding' involves a transferred epithet, for the proceeding is not itself criminal any more than the Foreign Office is foreign. Since a criminal proceeding means a proceeding for a crime, we cannot define the one without defining the other. Any case deciding that a proceeding is criminal impliedly decides that the act for which it is brought is a crime. There may be exceptions to this, as there are exceptions to most legal propositions, but they are too rare to affect the utility of the generalisation.

### THE DEFINITION OF DEFINITION

Why is there disagreement on the definition of crime? Partly it is because neither the courts nor the legislature have succeeded in producing a clear-cut concept; there is much overlap between the civil and criminal departments of the law. But perhaps an even more operative reason for the failure lies with the jurists who attempt the definition. There is an underlying disagreement on the very meaning and purpose of definition. Until this more fundamental problem is resolved, we can hardly expect agreement to emerge on the definition of particular legal concepts.

In this intellectual anarchy perhaps the best one can do is to advance one's own definition of definition and proceed on that basis. However, in a brief attempt to win agreement at least from some readers, let me avoid the term 'definition' for a moment and describe a process that we actually employ. When the meaning of a word is imperfectly known, we often clarify it by substituting for this word another word or group of words the meaning of which is better apprehended. Every one agrees that this process is aptly called definition. There is no other common word for it but 'definition'. I do not say that the instance I have given is the only type of definition: for example, there is also definition by pointing (ostensive definition), which is ultimately the only way of defining colours; but this is of little importance for the lawyer. For the lawyer, as for the lexicographer, definition is an equation of verbal symbols.

Now some writers use the word 'definition' in a second meaning, as a synonym for 'description'. I belong to the com-

pany that regards this duplication of meaning as a blunder. We already have the word 'description' to signify description, and it seems an abuse of words to rob 'definition' of its precision by extending it to this other meaning. Definition, in the sense attached to the word in the previous paragraph, is always a definition of words. A definition is not a revelation of reality, except in so far as it states how a word is used. It is part of the process of naming. Description, on the other hand, is a statement about things or referents. It assumes that you know what thing you are talking about, and it does not, as definition does, state or control the use of words. A description may be true or false; a definition is not true or false except in so far as it is a statement of how a word is used.[1]

If, contrary to this view, you insist that definition is a kind of description (which is a verbal question), at least admit that definition is such a description of properties as determines the application of the name. When the description does not affect naming, it is not definition.

To return, then, to the subject in hand: if we can frame a definition of crime that will state the legal use of the word, we shall have succeeded in our principal purpose. It will be no objection that the definition does not say everything there is to be said about some or all of the acts we call crimes. Nor will it be an objection that the definition does not state the 'real essence' of a crime, whatever that phrase may mean. For instance, suppose we give our approval to the definition of crime as a wrong that can be prosecuted and punished, and suppose that this definition does state the legal use of the word 'crime'. Someone is sure to protest that it is only a statement *about* crime, or about the possible consequencies of crime; it does not tell us what a crime really and essentially *is*. To meet an objection of this kind I like to recall a passage in Dr. I. A. Richards' admirable book *Interpretation in Teaching*.[2] The author deals with the demand for essences by an effective parody.

'Suppose someone says, "What is an apple?" Our answer might be, "It is a fruit that grows on a tree". To which he

[1] The fullest discussion of this subject by an English philosopher is Richard Robinson's *Definition* (London, 1950). He concludes, at p. 190, that the term 'real definition' (which means description) should be dropped, and the term 'definition' confined (as in the text above) to nominal definitions.

[2] London, 1937, p. 354.

might reply, "I was not asking you where it grew; I was asking you what it is". We try again, "It is a refreshing fruit". He replies, "I was not asking you what it was like or what it did; I was asking you what it is". Suppose we say, "It is an assemblage of cells, a system of molecules, atoms, etc.". He can always reply, "I was not asking you what I should see if I took a microscope to it or what chemical hypothesis would explain what would happen to it if we did certain things to it etc. I was asking you, quite simply, what it is?" In this way, he has beaten us from the start. We can only dispose of him by saying that his question is illegitimate, and that, if we define a question as something that theoretically can have an answer, his demand is not a question. It is only supposed to be one by having the same verbal form as some things which are questions and so, theoretically, can be answered'.

With this somewhat lengthy introduction, it is time to start the main enquiry.

## CRIME INCLUDES SUMMARY OFFENCES

For most legal purposes, the best definition of crime is that *per simplex enumerationem:* crimes are—or at any rate chiefly include—felonies, misdemeanours and summary offences. Thus Littledale, J., said: 'Crime includes treason, felony and misdemeanours'.[3] Nowadays we include treason among the felonies[4]; and although according to the older usage the word 'misdemeanours' includes summary offences,[5] it is now the practice to state these separately.

The popular meaning of crime is narrower than the legal one, and this has proved to be another stumbling-block in the way of an agreed definition. One would think that the task of the analytical jurist was merely to define a legal term in its legal meaning. However, some writers on the definition of crime shift from one meaning to the other in a confusing way. This may be partly because of the common idea that the popular meaning of a term somehow contains more philosophical truth than the

[3] *Mann* v. *Owen* (1829) 9 B. & C. 595 at 602.

[4] It always was so included in theory (Hawkins, *P.C.*, ii, Chap. 37, s. 9), and modern procedural changes have removed any excuse for mentioning it separately.

[5] *E.g.*, Metropolitan Police Courts Act, 1839, s. 24; *R.* v. *Pickup* [1928] 2 K.B. 459.

technical meaning. In fact, the popular meaning is never any more 'true' or 'real' than the technical meaning. The only differences are that we may be more used to the one than the other, and that one may be more or less apt for a particular purpose than the other.

There is, however, some excuse for muddle in the present instance, because the popular meaning of the word 'crime' is occasionally used by lawyers themselves. The older editions of Russell call the work a *Treatise on Crimes and Misdemeanours,* thus using crimes as synonymous with felonies, and distinguishing them from misdemeanours. There is a particular reluctance to use the expressions 'crime' and 'criminal' with reference to summary offences. This is because of the strongly emotive nature of these words, which makes them unsuitable for minor transgressions. Statutes creating summary offences use the less condemnatory term 'offence', and this term is, indeed, employed to cover even the graver crimes. For children and young persons some people think even the words 'offence' and 'offender' too strong, and instead speak of juvenile delinquency and delinquents.[6]

Notwithstanding these refinements of usage, it can be said with assurance that in the technical language of the law misdemeanours and summary offences are legally crimes, and that even children commit crimes. Thus Blackstone wrote that 'though in common usage the word "crimes" is made to denote such offences as are of a deeper and more atrocious dye, while smaller faults are comprised under the gentler name of misdemeanours', the word 'crime' is properly speaking of broad significance.[7] It has been expressly decided that a misdemeanour is a crime within the meaning of a statute.[8] Whenever a statute creates a new misdemeanour, it will be taken to have created a new crime, just as when it creates a new felony. There is also a chain of cases deciding that proceedings for a summary offence

[6] The Criminal Justice Administration Act, 1914, s. 10, uses 'youthful delinquents' in the marginal note to refer to offenders between 16 and 21; but the body of the section uses the word 'offenders'; cf. Children and Young Persons Act, 1933, s. 59 (1). Sir Norwood East commented that 'an ugly thing is not made attractive by a mere change of name': *Society and the Criminal* (London, 1949), p. 239.

[7] *Comm.*, iv. 5. Blackstone said that 'crime' and 'misdemeanour' were synonymous, but his editor notes the modern usage by which 'misdemeanour' means a crime less than felony.

[8] *Mann* v. *Owen*, above, n. 3.

are criminal,[9] even though the only possible punishment is a fine[10] and it has been expressly decided that a summary offence is a 'crime' for the purpose of the requirement of *mens rea*.[11]

### THE ATTITUDE OF CRIMINOLOGISTS

The result is that the legal meaning of 'crime' is different from the popular meaning. It is also different from the meaning favoured by some criminologists, who propound the theory that criminals are a class set apart by differences of heredity or upbringing. There was a time when criminologists of the Italian school believed that a true criminal could be detected by measuring the shape of his skull or the size of his wisdom teeth; and although this idea is now discarded, some (by no means all) still appear to believe that criminals have some specific psychological malformation which can be revealed by a psychiatrist. Now one can see that there may be something in this if one is considering a robber who hits an old woman with a length of iron pipe, or even a forger on whom nature has conferred the gift of being able to reproduce his country's currency; but obviously the theory will never do if the word 'crime' is made to include such delinquencies as that of a housewife who shakes her door-mat in the street after 8 a.m., or a shopkeeper who fails to stamp a cash receipt, or a guest who fails to enter his name, nationality and date of arrival in the hotel register, or the proprietor of a milk bar who allows his customers to play a gramophone quietly, behind closed doors, but without an entertainment licence from the justices. When crime is defined as widely as this, crime becomes a *malaise* affecting almost every one in society, and it is merely the benevolence or preoccupation of the police that saves us from being in court on one charge or another several times in our lives. If criminals like these are abnormal, the normal person is not to be found.

The truth is that the criminologist, when he forms his

[9] *Cattell* v. *Ireson* (1858) E.B. & E. 91; *Mellor* v. *Denham* (1880) 5 Q.B.D. 467 (C.A.); *Osborne* v. *Milman* (1887) 18 Q.B.D. 471 (C.A.); *Chung Chuck* v. *R.* [1930] A.C. at 250 (P.C.). A charge of a summary offence is a criminal charge; *Buckley* v. *Gross* (1863) 3 B. & S. 566.

[10] *Parker* v. *Green* (1862) 2 B. & S. 299, *per* Crompton, J.; R. *(Gillingham)* v. *Paget* (1881) 8 Q.B.D. 155; *Benson* v. *N.I.R.T.B.* [1942] A.C. 520.

[11] *Hearne* v. *Garton* (1859) 2 E. & E. 66; Williams, *Criminal Law: The General Part* (London, 1954), § 74, n. 1.

theories, does not think of these petty offences. His generalisations result from concentrating on the very small proportion of the total of offenders who are sentenced to prison, and who are almost always there for dishonesty or violence. But the theory of crime as mental abnormality needs qualification even for supposedly serious crimes. In its unqualified form it can only be made to work by taking weakness of control, or the dominance in the mind of self-regarding motives, as a symptom of mental abnormality; so interpreted, the theory becomes a tautology. If mental abnormality be limited to the standard categories of psychotics, neurotics, mental deficients and psychopaths, the great majority of criminal prisoners are normal. They can be characterised as 'socially maladjusted', but if this phrase is to be given any meaning different from criminality itself, we must recognise that some persons technically criminal may be socially normal, and that some persons may show mischievous symptoms of social maladjustment without committing any crime.

The theory becomes still less tenable if one looks outside the crimes of dishonesty, violence and sexual abnormality. Abortion, for example, is ranked as a felony; but are we to regard the many thousands of women who undergo this illegal operation as neurotic, psychotic, or socially maladjusted? If so, would a repeal of the abortion laws effect a medical cure of their anti-social disease? Evidently, the theory cannot work at all for the violation of rules that do not reflect the popular *mores*. Again, what of political crimes? Roger Casement was hanged for treason; George Washington was not; the difference of treatment did not rest on medical grounds.[12]

### IS THE LEGAL MEANING TOO WIDE?

This essay is concerned with crime in its legal meaning, not its popular meaning or criminological meaning. And it is concerned, primarily, with present legal usage, not with desirable changes. However, a few remarks on proposals for change may not be altogether out of place. Some criminologists advocate the complete disuse of the terms 'crime' and 'criminal', in order to mark and foster a change of social attitude. If they had their wish,

[12] For a sensible treatment of the problem see Albert Morris, *Criminology* (New York, London, Toronto, 1934), Chap. 4. 'It is just as unsound to equate the concepts of criminality and mental disorder as it is to identify crime with sin': Dr. E. B. Strauss in 5 *Howard Journal* 167.

the word 'criminal' would go the way of the word 'lunatic'. We are in fact in process of verbally 'destigmatising' the criminal, partly by the common avoidance of this word, and partly by our gross adulteration of its meaning. When the concept of crime is weakened by being made to take in the vast number of summary offences under statute, the tendency must be for the word with its associations to lose its former emotive effect. It may be argued, against the criminologists, that this emotive effect is socially desirable, and should be preserved by restricting the meaning of the word 'crime'. Particular objection attaches to regarding as criminals those who are found guilty before magistrates without *mens rea,* or in reasonable ignorance of the correct interpretation of the law. If it is necessary to inflict penalties on such people, at all events they should not be criminals. Perhaps the worst example is under the Food and Drugs legislation, where a respectable manufacturer or retailer is charged with selling an article not of the nature, substance or quality demanded by the purchaser. This utterly vague Parliamentary formula must be given concrete meaning in each case by the decision of the magistrates; and when the magistrates have attached the meaning they may immediately proceed to convict the defendant for breach of the statute. What is needed here (if I may digress for a moment into a question of law reform) is a kind of proceeding for an injunction against the defendant to compel him to perform his public duty. There are, indeed, some precedents for injunctions to compel the performance of penal laws, the action being brought in the civil courts by the Attorney-General, acting either on his own motion or on the relation of another.[13] However, the cases, so far as they have gone, allow this remedy only when the penal remedy is inadequate.[14] It should be allowed also

[13] *Att.-Gen.* v. *Sharpe* [1931] 1 Ch. 121 (C.A.), following *Att.-Gen.* v. *Ashborne Recreation Ground Co.* [1903] 1 Ch. 101, and followed in *Att.-Gen.* v. *Premier Line* [1932] 1 Ch. at 313. These cases show that the remedy is available even though the crime was created by a statute which provided some other remedy. It is submitted that a mandatory injunction can be granted to undo the illegal act if that is required by the policy of the statute. *Att.-Gen. for Northern Ireland* v. *Eastwood* [1949] N.I. 45 is not against this view: see note in 13 J. Cr. L. 302.

Of course, a private plaintiff may sue for an injunction in his own name if the penal statute is construed as giving him a private right: *Cooper* v. *Whittingham* (1880) 15 Ch.D. 501; *J. Lyons & Sons* v. *Wilkins* [1896] 1 Ch. at 826 (C.A.).

[14] This was the basis of the decisions cited in the last note, all of them being concerned with offences under statutes or delegated legislation. In

where the penal remedy is inappropriate, the defendant being a good citizen who will comply with the law as soon as it is established against him. If Parliament saw fit to legislate along these lines, it could, if desired, entrust the power to grant the injunction to the criminal courts; and in that event the criminal courts might be given a general discretion to issue this injunction instead of convicting. A partial precedent is to be found in the Factories Act, 1937, s. 132, which enables a magistrates' court to grant a form of injunction in criminal proceedings against the owner of a factory who is in breach of the Act; but here a conviction must be registered, which seems inapt if there has been a genuine doubt as to the law.

Another defect in our present arrangements is that the citizen who finds a penal regulation obscure or ambiguous is given no legal procedure by which he can obtain an interpretation of its meaning, except by standing in the dock as defendant to a criminal charge. He cannot, as a plaintiff and free man, bring an action against the Crown for a declaration as to the meaning of the statute.[15] No one would suggest, of course, that a man should be able to sue for a declaration as to the limits of the crimes of murder or robbery. But it is otherwise with offences not constituting the breach of recognised ethical standards—*mala prohibita* if one likes to call them that. With the close social and economic regimentation that seems to be an inseparable part of modern society, it is utterly unsuitable that the citizen can only find out the limits of the permissible by bringing down a prosecution upon his own head.

All these considerations suggest that the notion of crime has become too comprehensive. To confine it to the more serious offences would have the beneficial result that the legal meaning would correspond more closely with the popular one. Also, a reclassification of offences in terms of social or moral gravity

the case of public nuisance, which is a crime at common law, it appears that the relator action is freely allowed as an alternative to indictment. For statutory nuisances see Public Health Act, 1936, s. 100. See also the provision in the Historic Buildings and Ancient Monuments Act, 1953, s. 14 (3).

15 See Williams, *Crown Proceedings* (London, 1948), p. 88, for the very limited exceptions. *Dyson* v. *Att.-Gen.* [1911] 1 K.B. 410 is limited to cases where an order is alleged to be *ultra vires* or otherwise void; it is not extended to questions of interpretation. See the strong criticism of the present law by Borchard, 'Challenging "Penal" Statutes by Declaratory Action' (1943) 52 *Yale L.J.* 445 at 475 *et seq.*

would increase the utility of the criminal statistics. If the word 'crime' were restricted in this way we should need a new name for the general subject now known as the law of crimes; and such new name should, for convenience, supply us with an adjective to replace 'criminal' and a noun to replace 'the criminal'. At present there is no single word that does this. We could use 'penal' as a generic adjective, speaking of penal law, a penal proceeding, and penal conduct[16]; but then for the generic nouns (since there is no suitable noun derived from 'penal') we should have to use 'offence' and 'offender' or 'delinquency' and 'delinquent'. Some may think 'offence' too weak a word for murder, just as 'crime' is too strong for a parking offence; 'delinquency' is in the unhappy position of being too weak for the one and too strong for the other. Not to anticipate these linguistic reforms, I will assume it to be granted that the word 'crime' has, at present, a wide legal meaning which embraces even summary offences.

## THE MATERIAL DEFINITION OF CRIME

The definition of crime as including felonies, misdemeanours and summary offences, though correct as far as it goes, and illuminating enough to the lawyer, is logically incomplete. Are there crimes not coming within these categories? And what do 'misdemeanour' and 'summary offence' mean? A summary offence is a kind of crime punishable by justices; but if we leave the matter there our definition is circular.

To make further progress, the common-sense approach is to consider whether there are any intrinsic differences between the acts constituting crimes and civil wrongs respectively. It is perhaps natural to suppose that since 'a crime' differs from 'a civil wrong', there must be something *in* a crime to make it different from a civil wrong.

As everybody knows, there is one serious hindrance to a solution of this kind. This is the overlap between crime and tort. Since the same act can be both a crime and a tort, as in murder and assault, it is impossible to divide the two branches of the law by reference to the type of act. So also it is impossible to divide them by reference to the physical consequences of the act, for if

[16] The title selected by the American Law Institute for a Model Code now being drafted is the 'Penal and Correctional Code'.

the act is the same the physical consequences must be the same.

It has occurred to some that there is a possible escape from this difficulty. Although the act, and its consequences, are the same, the act and consequences have a number of different characteristics or aspects; and it may be possible to identify some of these characteristics as criminal and some as civil. Pursuing this line of thought, two separate aspects have been seized upon as identifying crime: the aspect of moral wrong, and the aspect of damage to the public. The arguments for treating these as tests of crime were considered and dismissed by Kenny; but his words did not seem convincing to Sir Carleton Allen, who revived the test of moral wrong[17]; nor to Professor Jerome Hall, who accepted the test of moral wrong and added to it that of public damage.[18] Neither writer succeeds in answering the arguments against his position; and in my opinion they have both been led to sponsor an untenable definition of crime through their failure to restrict the question of definition to its proper sphere.

The proposition that crime is a moral wrong may have this measure of truth: that the average crime is more shocking, and has graver social consequences, than the average tort. Yet crimes of strict responsibility can be committed without moral wrong, while torts and breaches of trust may be, and often are, gross moral wrongs.

Even where a forbidden act is committed intentionally, a court deciding that it is a crime is not committed to the proposition that it is a moral wrong. Thus in holding that a summary proceeding for an offence under the Game Act was criminal in character, Lord Campbell, C.J., said: 'It is our business, not to estimate the degree of moral guilt in the act of the appellant, but to see how such act is treated by the legislature. . . . I cannot be bound by any opinion I may form of the morality of that act: but I must see what it is that the legislature has chosen to punish'.[19] There are crimes of great gravity in the legal

[17] 'The Nature of Crime' (1931) 13 J. Comp. Leg. (3rd Ser.) 1, reprinted in his *Legal Duties* (Oxford, 1931), p. 220. See, *contra*, the admirable article by Professor Morris R. Cohen, 'Moral Aspects of the Criminal Law' (1940) 49 *Yale L.J.* 987.

[18] *General Principles of the Criminal Law* (Indianapolis, 1947), Chap. 7. 'Penal law is concerned with social harms which include moral culpability as an essential element' (p. 213).

[19] *Cattell* v. *Ireson* (1858) E.B. & E. at 97–98.

calendar, such as mercy-killing and eugenic abortion, which are disputably moral wrongs, though they are indisputably crimes. The same is true of numerous summary offences. Lord Atkin put the situation pungently. 'The criminal quality of an act cannot be discerned by intuition; nor can it be discovered by reference to any standard but one: is the act prohibited with penal consequences? Morality and criminality are far from coextensive; nor is the sphere of criminality necessarily part of a more extensive field covered by morality—unless the moral code necessarily disapproves of all acts prohibited by the State, in which case the argument moves in a circle'.[20]

As a matter of legal history, the notion of crime as moral wrong has affected the law in some respects. In the seventeenth century no clear distinction was drawn between law and morality; this distinction was a product of the late eighteenth century, and particularly of utilitarianism. The older notion lingered in the claim of the judges to punish new types of wrong as 'public mischief'[21]—a claim now apparently given up except in connection with conspiracy.[22] The requirement of *mens rea* in its original sense of a wicked mind was also a product of this notion; and there are still occasions when *mens rea* is used to refer to moral wrongdoing.[23] Statutory crime without *mens rea* is sometimes spoken of as 'constructive crime'[24] or a 'quasi-criminal offence'.[25] These expressions are, however, little more than a mark of disapproval for including this as a kind of crime. Crime it is for legal purposes, with all the consequences that the word entails for the accused.

Sometimes the courts revert to the ancient and difficult distinction between *mala in se* and *mala prohibita;* and by means of it they are led to punish *mala prohibita* (which are invariably statutory offences) although the defendant had no

[20] *Proprietary Articles Trade Assn.* v. *Att.-Gen. for Canada* [1931] A.C. at 324 (P.C.). The question in issue in this case turned on the special provision of the British North America Act, 1867, s. 91 (27); this Canadian constitutional problem is not discussed in the present article.

[21] *E.g., Wheatley* (1761) 2 Burr. at 1127; *Young* (1789) 3 T.R. at 104; *Higgins* (1801) 2 East at 21.

[22] *Newland* [1954] 1 Q.B. 158.

[23] See Williams, *Criminal Law: The General Part,* § 26.

[24] *E.g.,* Lord Shaw in *Lanier* [1914] A.C. at 228 (P.C.).

[25] *E.g.,* Channell, J., in *Pearks, Gunston & Tee* v. *Ward* [1902] 2 K.B. at 11; cf. *Sherras* v. *De Rutzen* [1895] 1 Q.B. at 922 ('acts not criminal in any real sense').

*mens rea*. Thus Wills, J., said: 'There is a distinction between things criminal in themselves and things which are made criminal and are prohibited under a penalty simply for the public good'; and he accordingly held that a by-law could create vicarious criminal responsibility for the offence of slaughtering sheep in the view of other sheep.[26] Apparently the learned judge thought that this conduct was merely *malum prohibitum*. Yet the enacting authority plainly regarded it as a kind of cruelty to animals, which is generally thought to be, if anything, *malum in se*. Another instance of the same approach seems to be in respect of the statutory offence by a publican of suffering gaming on his premises. Cockburn, C.J., remarking that 'this is on the confines between a civil and criminal offence', held that the publican was vicariously responsible for the acts of his barman.[27] These cases remain anomalous, for it is by no means true generally to say that there is vicarious responsibility in crime for *mala prohibita* (whatever may be understood by that expression).[28] On the whole the incursion into law of this philosophical distinction has been unfortunate.

Those who think that crime is a moral wrong sometimes claim in support the rule for malicious prosecution. It is a tort maliciously and without reasonable cause to prosecute another for a crime; but 'crime' for this purpose means only a charge 'involving either scandal to reputation or the possible loss of liberty to the person'.[29] The relevance to our enquiry of this special limitation of the meaning of crime is only superficial. It is merely a limitation of the action for malicious prosecution, springing perhaps from a desire to confine this action to the more serious cases; and it is no more germane to the definition of

[26] *Collman* v. *Mills* [1897] 1 Q.B. 396. The decision is capable of being explained on narrower grounds: see Williams, *op. cit.*, § 79, n. 6; and cf. *ibid.*, §§ 47, n. 2, 83.

[27] *Crabtree* v. *Hole* (1879) 43 J.P. 799. But these publican cases, also, can be explained upon narrower grounds: Williams, *op. cit.*, § 79.

[28] A statute provided that a sheriff's officer who took fees greater than those allowed in the Act should be liable to be punished 'in like manner as a person guilty of contempt of the said court may be punished,' *i.e.*, by fine and imprisonment. Lord Esher, M.R., in *Lee* v. *Dangar, Grant & Co.* [1892] 2 Q.B. at 347–348 left open whether the offence was strictly a crime, saying that it was at any rate an offence in the nature of a crime, which was subject to the ordinary requirement of *mens rea*, and ordinary rule against vicarious liability.

[29] *Quartz Hill Gold Mining Co.* v. *Eyre* (1883) 11 Q.B.D. at 691 (C.A.); cf. *Wiffen* v. *Bailey* [1915] 1 K.B. 600 (C.A.).

'crime' in general than is the special definition of that word in the Prevention of Offences Act, 1871, s. 20. The most it shows is the occasional need of lawyers to use 'crime' in its popular sense, as including only the more grievous wrongdoings.

The notion of crime as moral wrong may be behind the criminologist's use of the word to which reference has already been made. Lombroso's theory of the criminal type assumed that crime was so real a part of the empirical world as to be reflected in the physical body. Criminals, in his view, belonged to a separate, degenerate group recognisable by physical characteristics. When, at the present day, a mental expert speaks of 'moral insanity' or of a 'moral defective', he may seem at first sight to be reasserting in the psychological sphere a theory of the criminal type, and to some extent this is true. 'Moral defectives' are defined in the Mental Deficiency Act, 1927, s. 1, as 'persons in whose case there exists mental defectiveness coupled with strongly vicious or criminal propensities and who require care, supervision and control for the protection of others'. Some, while accepting the concept, would now wish to replace the word by 'psychopath'. However, the word 'criminal' in the definition just quoted hardly bears its strict legal meaning; in the context it refers not to everything that may legally be criminal but to abnormally self-regarding behaviour as opposed to social behaviour. Some of the activities of the psychopath, though symptomatic of his condition, are lawful, for the law does not forbid all egocentric conduct. The characteristic of the psychopath is that he has a totally abnormal inability to restrict his conduct to the sphere that is allowed. Thus the definition of psychopathic state need not presuppose a theory of 'natural crime'.

The second intrinsic difference between crimes and civil wrongs found by some writers is in respect of the damage done. In tort there is almost invariably actual damage to some person, whereas in crime such damage is not essential, the threat being to the community as a whole. This is sometimes made the foundation of a definition, Lord Esher for example saying that 'an illegal act which is a wrong against the public welfare seems to have the necessary elements of a crime'.[30] Again there are

[30] *Mogul Steamship Co.* v. *McGregor Gow & Co.* (1889) 23 Q.B.D. at 606; cf. Bl. *Comm.*, iv, p. 5.

formidable objections. Some torts do not require damage (such as trespass and libel), while many crimes do involve private damage. Some crimes are punished as an affront to the moral feelings of the community although they cause no damage to the community as a whole. This is true of the group of crimes having in differing degrees a religious aspect: blasphemy, attempted suicide, abortion, bigamy. It is also largely true of obscenity and adult homosexuality. Even murder need not cause public damage: for example, when a mother kills her infant child. This creates no general sense of insecurity; the only material loss to society is the loss of the child, and whether that is economically a real loss or a gain depends on whether the country is under- or over-populated at the time. Evidently, the social condemnation of infant-killing rests on non-utilitarian ethics. Some forms of public nuisance, too, are crimes although they positively benefit the community.[31]

Even where an act injures the community, it need not be exclusively a crime. Thus some crimes, as has already been pointed out, may be made the occasion either of a criminal prosecution or of a civil action (generally a relator action) for an injunction by the Attorney-General; in the latter event the crime is treated not as a crime but as a civil wrong to the public. There are civil public wrongs that are not crimes, for which there is no remedy but a relator action, as where statutory powers are being exceeded. Indeed, an ordinary tort to property may be committed against public property and so become a public wrong. If these objections are not enough, there is the additional criticism that the distinction between the community and the individual is not sufficiently clear-cut to explain the use of the legal term. Between society as an aggregate of individuals at one end of the scale and a single individual at the other there are various intermediate groups, and the question whether such an intermediate group approximates to the individual or to society as a whole is one of degree. There is no line clear enough to make a definition in these terms express the sharpness of the legal concept of crime.[32]

[31] *Ward* (1836) 4 Ad. & El. 384.

[32] Most contrasts between the individual and the community are false, for, as the Greek proverb has it, 'what is not good for the hive is not good for the bee'—and *vice versa*. A curious reversal of the traditional notion of penal law is to be found in *Solomons* v. *R. Gertzenstein Ltd.*

The notion of crime as a threat to the whole community is the material counterpart of the formal rule that the State alone is master of a criminal prosecution. The private prosecutor cannot withdraw his charge at will, because he has brought to light something that is important to society; whereas the plaintiff in an action can put an end to the proceeding, because it is of importance for himself alone. However, the distinction becomes difficult to apply when the same act is both a crime and a tort—it requires some refinement of reasoning to say that an assault both is and is not of importance to the victim alone. Also, modern thought is tending to reject the notion that civil wrongs are indifferent to the community.

These cumulative objections make it safe to say that the element of injury to the community can form no part of the definition of crime. The point is of some legal importance, because it has been argued, in prosecutions for trespass in pursuit of game, that the object of the Game Acts being to protect a private right, a charge made under them is civil in character. This argument has been rejected, it being held that in substance as well as in form the proceeding is criminal.[33]

The definition of crime as a wrong affecting the public was expressed in the cases, already noticed, which claimed to treat all new public mischiefs as crimes. Another rule sometimes found in the old authorities, which may be regarded as the converse of this, is that if an act is not a public mischief it is not a crime at common law.[34] But judicial notions of what constituted a public mischief were peculiar: obtaining property by false pretences was thought to be a mere private injury, of no concern to the public, so that this conduct did not become criminal until Parliament intervened. At the present day the creation of new crimes

[1954] 2 Q.B. 243 at 265. A statute required the owners of certain buildings under penalty to provide means of escape in case of fire: did this give a right of action in tort to those injured by breach of the duty? Yes, said Romer, L.J., because 'the principal purpose of . . . section 33 is the protection of individuals rather than the promotion of the interests of the masses'. If one considers that the 'individuals' were all those who might be in any of the specified buildings when fire broke out, they potentially included all members of the public.

[33] *R.* v. *Fletcher* (1876) 2 Q.B.D. 43, *per* Amphlett, J.A. (hence when certiorari is brought in respect of such proceedings, no appeal lies to the Court of Appeal).

[34] *Daniel* (1704) 3 Salk. 191; *Wheatley* (1760) 1 W. Bl. 273; *Richards* (1800) 8 T.R. 634.

will be left to Parliament, whose assessment of what the public interest requires is conclusive.

It may be taken, then, that no material (or intrinsic) definition of crime explains the whole range of the word 'crime'? Here we may notice a reply that seems to be made by Professor Jerome Hall.[35] He points out, rightly, that all definitions are difficult of application in limiting cases, so that this mere fact is no objection to a definition. For instance, the definitions of 'plant' and 'animal' are hard to apply to creatures (like *Euglena*) that are half plant, half animal. Professor Hall is speaking particularly of the penal action, and in this application his argument is sound. The penal action sounds partly in crime and partly in civil wrong. Hence the fact that a definition of crime neither quite includes it nor quite excludes it is no objection to the definition; on the contrary, it shows that the definition is a good one, because it reproduces the marginal obscurity of the word. However, it would be a mistake to use this argument to meet the objections I have urged against the material definitions of crime. In the situations I have instanced, these material definitions fail to express the *clear* legal usage of the word 'crime'. They are, therefore, incorrect statements of the legal meaning.

## THE FORMAL DEFINITION

We have rejected all definitions purporting to distinguish between crimes and other wrongs by reference to the sort of thing that is done or the sort of physical, economic or social consequences that follow from it. Only one possibility now remains. A crime must be defined by reference to the *legal* consequences of the act. We must distinguish, primarily, not between crimes and civil wrongs but between criminal and civil proceedings. A crime then becomes an act that is capable of being followed by criminal proceedings, having one of the types of outcome (punishment etc.) known to follow these proceedings. One might put it this way, that just as a film projector throws an image on the screen, so the working of criminal justice creates the phantom of legal crime. I say 'phantom' advisedly, since the legal quality of criminality is the product of our minds. The criminal act may have serious social consequences, or it may be disputable whether

[35] *Op. cit.*, p. 213.

it has any bad social consequences at all; but it is a crime if so treated by the courts.

This definition, for which there is considerable authority, expresses the traditional legal distinction between criminal and civil in the realm of jurisdiction, procedure, and sanctions. According to the established dichotomy, all jurisdiction of the ordinary courts is either criminal or civil. If it is not criminal, it must be civil.[36] There are no common features of civil proceedings, in respect either of procedure or of the relief sought, and they are in fact a mere residuary class comprising those proceedings that are not criminal.

The formal definition seems to me to fulfil the function of a definition by explaining the way in which the word 'crime' is used. Nor is it quite so uninformative as may appear at first sight. Suppose a Minister announces that in view of the recent experience with myxomatosis, he is preparing a Bill to make it a crime for any person to introduce a new disease of animals into this country. The whole of the meaning of this announcement is exhausted by translating it into the statement that such conduct is to be made a new occasion for applying the procedural complex known as prosecution, with its well-known consequences. A lawyer could elaborate upon this translation so as to remove any possibility of misapprehension in the mind of a non-legal hearer.

Nevertheless, the formal definition has appeared unsatisfactory to many lawyers, and we must consider some of the attacks that have been made upon it.

It is certainly no objection to the formal definition that it does not enable one to tell by simple inspection whether an act

[36] Thus Lord Sumner said that for practical purposes (apart from ecclesiastical matters) all matters are either civil or criminal: *Re Clifford and O'Sullivan* [1921] 2 A.C. at 586. Cf. *per* Kennedy, L.J., in *R.* v. *Wiltshire JJ.* [1912] 1 K.B. at 572 (C.A.); *Lynch* v. *Limerick C.C.* [1925] I.R. at 66. The following matters have been held to be civil: affiliation (*Cattell* v. *Ireson* (1858) E.B. & E. at 96, 98; *O'Donnell* v. *Hegarty* [1941] I.R. 538, 6 J. Cr. L. 131; *Morrissey* v. *Boyle* [1942] I.R. 514, 7 J. Cr. L. 149); the confirmation or disallowance of a statutory scheme (*Ringwood* v. *N. Dublin R.D.C.* (1927) 62 Ir. L.T.R. at 55); licensing matters (*O'Connor* v. *Fahy* (1943) 77 Ir. L.T.R. 152, noted in 8 J. Cr. L. 152). The prerogative writs and orders are protean. A coroner's inquisition is a criminal proceeding, because it is a mode of inquiry into the commission of an indictable offence (*per* Parke, B., in *Att.-Gen.* v. *Radloff* (1854) 10 Ex. at 105).

is a crime or not. There is no definition of crime from which all the precepts of criminal law will automatically follow.

A frequent objection to the definition is that it is circular, but again this is misconceived. One would, indeed, be guilty of circularity if one defined a crime as a breach of criminal law; though even this definition would have some utility as indicating that a crime is not necessarily a moral wrong. Similarly, Blackstone's definition of a crime as a violation of public law[37] is circular if no definition can be given of public law which dissociates it from the notion of crime. But I do not think that a definition of crime in terms of criminal procedure, jurisdiction, and sanctions, is necessarily circular, even though it may superficially appear to be so. The question is whether criminal procedure can be described at large in language not involving the word 'crime' or any similar word; and so with jurisdiction and sanctions. The answer to this is in the affirmative, though admittedly there are complications.

### THE OBJECTION OF INADEQUACY

The most frequent objection to the formal definition is that it is inadequate. This has been pressed, particularly, by Sir Carleton Allen, with whom Professor Jerome Hall largely agrees.

Sir Carleton Allen, after admitting that the formal definition of crime as involving liability to punishment is accepted by the courts, says: 'But that is not more than a distinguishing mark: it does not explain the thing itself. Any description of crime which centres either in procedure or in the fact of punishment amounts only to a formal, not a material, definition. It is not enough to know that crime is a punishable wrong; the problem is, why is it punishable? Why, in other words, does the State consider it necessary, in the case of some wrongs but not of others, to take direct disciplinary action?'[38]

In answer to this objection it may be said to confuse two quite different questions: the question of definition and the question why the State punishes crime. The second is not a question of definition if (as I take to be the case) it does not control the use of the term 'crime'. The learned author's

[37] *Comm.*, iv, p. 5; cf. Viscount Cave in *Re Clifford and O'Sullivan* [1921] 2 A.C. at 580; *Chung Chuck* v. *R.* [1930] A.C. at 250 (P.C.).

[38] *Legal Duties* (Oxford, 1931), p. 233. Cf. Jerome Hall, *op. cit.*, p. 188 *et seq.*

objection that the formal definition 'does not explain the thing itself' is perhaps slightly reminiscent of the search for the essence of an apple. Surely a definition need not explain anything except the use of a word.

Sir Carleton Allen regards his further inquiry as a matter of definition, because he thinks he is contradicting Kenny, who was avowedly concerned with definition. In this further inquiry, he goes back to the material definition of a crime as a moral wrong, embracing it as the true definition of the word. Sir Carleton is, of course, aware of the elementary objections to it from the point of view of a lawyer, but apparently abandons this legal point of view at this stage of the argument, accepting instead the popular meaning of crime as constituting the essence of the concept.[39]

Is it not illegitimate to criticise a *legal* definition of crime by reference to the popular meaning of the word? One may say that the legal usage is unfortunate, but that is a matter of opinion. However unfortunate the usage, the task of the legal definition is to state how lawyers actually use the word.

Perhaps this is merely a question of what is meant by definition; more interest attaches to examining Sir Carleton Allen's factual propositions. Answering his own question, he says that 'crime is crime because it consists in wrong-doing which directly and in a serious degree threatens the security or well-being of society, and because it is not safe to leave it redressable only by compensation of the party injured'. At first glance this proposition may appear to be innocuous, if not platitudinous, and to furnish a material definition of crime against which no possible objection can be made. It may indeed be conceded that if our system were perfectly rational—if we had an alert legislature actively interested in the fabric of the law—the proposition might be very nearly true. Even on that assumption it would not be *quite* true, because on the one hand it forgets the public wrongs remedied by mandamus or injunction without being crimes, and on the other hand it neglects the crimes, mentioned previously, which depend on a religious or aesthetic reaction against the forbidden conduct, rather than on a calculation of the material harm caused. But even if one takes

[39] Cf. p. 237 ('If popular language be any guide . . .'); p. 240 ('whatever legal terminology may say, common sense simply revolts against such a monstrous use of language').

the ordinary run of crimes which are assumed to cause material harm, the proposition is open to the criticism that in this imperfect world it gets its tenses wrong. When Parliament creates a new crime as a matter of conscious policy, it generally does so, within Sir Carleton Allen's definition, because the conduct is supposed to be a serious threat to society. But this conduct will go on being a crime until the statute is repealed, even though opinion has changed about the seriousness of the conduct. To suppose that the law is immediately altered with each gust of majority opinion greatly exaggerates the ease of change, even in a democracy. Parts of the law are generally recognised to be overdue for reform, such as (at the present time) the law of betting and lotteries. What blocks legal change above all else is apathy or inertia—the reluctance of those in power to face the arguments for change and to make the effort required to bring it about. To this is added the fear of how organised and vociferous minority groups (particularly, in the present context, religious groups) may affect the next election. In sum, the most that can be said of the reason why crime is punished is that it *is* punished because it *was* thought to be a serious threat to society at the time when the legislation was passed. A point may be reached at which public opinion is so averse to treating the conduct as criminal that no prosecutions for it are brought. Even then, the conduct remains a crime for collateral legal purposes, such as the enforcement of a contract relating to it.

Besides this, not all crimes have been created by Parliament. Some are the work of the judges, made without any clear decision on the point of policy. Take attempted suicide. How many people really think it right to send to prison the unhappy wretch who has unsuccessfully attempted his own life? Yet it is occasionally done. The striking thing is that no one has considered whether the punishment of attempted suicide is necessitated by reasons of State. In the middle ages the king's judges treated suicide as a felony, but it seems that their object was to bring about a forfeiture and so enrich the royal treasury. The suicide himself could not, in the nature of things, be punished. Attempted suicide was not a crime. When, in the nineteenth century, the general theory was developed that an attempt to commit any crime was itself a crime, this was attached as a matter of legal logic to the notional crime of suicide. The judges did not decide

the policy question whether attempted suicide was such a serious threat to the security of society that it ought to be punished; they merely decided that it *was* punishable, as the mechanical conclusion in a legal syllogism.

### DIFFERENCES OF PROCEDURE

I have been so occupied with the semantic aspects of my problem and in repelling assaults upon the formal definition that I have left myself little space to show how this definition works.

As stated at the outset, there are many differences of procedure between crimes and civil wrongs. Often these differences are of no help in distinguishing between the two, because they are consequential differences—it is only when you know that the act is a crime or a civil wrong respectively that you know which procedure to select. However, some elements in procedure do assist in making the classification. When Parliament passes a statute forbidding certain conduct, it may refer in terms to certain procedural matters—such as trial on indictment, or summary conviction—which indicate that the act is to be a crime. Again, when it is disputed whether a given proceeding, such as a proceeding for a penalty, is criminal or civil, a point can be scored by showing that this proceeding has been held in the past to be governed by some procedural rule which is regarded as indicative of a criminal or civil proceeding, as the case may be. For example, the fact that a precedent decides that a new trial may be granted in a particular proceeding indicates that the proceeding is civil, since new trials are not granted in criminal cases.[40] On the other hand a precedent deciding that evidence of character is admissible in a certain proceeding indicates that it is criminal, since evidence of character is not admissible in civil cases, apart from certain quite definite exceptions.

Since the courts thus make use of the whole law of procedure in aid of their task of classification, an attempt to define crime in terms of one item of procedure only is mistaken. This remark applies to the test of crime adopted by Kenny,[41] following Austin[42] and Clark,[43] which links crime with the ability of the

[40] *Att.-Gen.* v. *Radloff* (1854) 10 Ex. 84 at 92; *per* Brett, M.R., in *Att.-Gen.* v. *Bradlaugh* (1885) 14 Q.B.D. 667 at 689 (C.A.).
[41] Reprinted in Appendix I of Turner's ed. of Kenny's *Outlines of Criminal Law* (1952).
[42] *The Province of Jurisprudence Determined,* 5th ed., i, p. 502.
[43] *Analysis of Criminal Liability* (Cambridge, 1880), p. 3.

Crown to remit the sanction. This test tells you whether an act is a crime only if you already know whether the sanction is remissible by the Crown. Almost always, however, the latter has to be deduced from the former, instead of *vice versa*. Thus Kenny defines *ignotum per ignotius*. This objection would not be open if Kenny's chosen procedural test were made available *along with all the others*. The procedural test does not give full assistance unless one is allowed to use the whole law of procedure.

Of course, a definition that uses all the distinguishing features of the law of procedure, as well as much of the law of jurisdiction and punishment, must be if fully set out a very long definition—a book rather than a sentence. This, however, is no objection. There is no special virtue in the single-sentence definition, except convenience, and convenience can be bought too dearly at the expense of accuracy. Many of the definitions given in the dictionary are concise only in appearance; not only do they frequently omit qualifications, but they use general terms which have themselves to be defined.

We need not be frightened of admitting exceptions in a definition. When one looks at the differences between criminal and civil procedure, there are hardly any that are not subject to exception one way or the other. This is because, in a large number of particular instances, the civil rule[44] is applied to a criminal charge, or *vice versa*. It was the existence of these exceptions that vexed Kenny; because of them, he rejected a number of definitions which he would otherwise have favoured. Oddly enough, the definition he eventually selected was itself subject to certain exceptions, which did not worry him. However, an author engaged on the task of definition makes quite unnecessary difficulties for himself by a fear of exceptions. If a verbal usage is irregular, this irregularity must of necessity be incorporated in any definition that purports to state the usage.[45]

[44] That is to say, the rule that prevails generally in civil cases but not generally in criminal cases.

[45] Lest this admission may be thought to destroy my objection to material definitions of crime, let me point the distinction. Suppose crime is defined materially as consisting of (1) moral wrongs that are punished by a certain procedure, plus, exceptionally, (2) legal wrongs that are not moral wrongs but are also punished by the same procedure. Here, the admission of the 'exceptions' under (2) destroys the material element in the definition. Since the wrongs referred to under (1) are not only moral but legal wrongs, the definition taken as a whole is equivalent to a formal definition which makes no reference to moral wrongs.

Kenny introduced another element into his definition of crime—the notion of punishment; and this is made the sole test by some other writers,[46] and by some judges.[47] If a single test of crime has to be taken, it is undoubtedly the best; and it is the only one upon which a congress of comparative lawyers could reach a measure of agreement. But as applied to English law the test is insufficient, because there is no way of distinguishing between the punitive fine and the civil penalty except in terms of procedure. There is also some difficulty in distinguishing between punitive imprisonment and civil coercive imprisonment; here again procedure comes to the rescue.

In this article I have slain a few dragons and rescued the purely legal definition of crime from the unwelcome attentions of certain criminologists and philosophers. I have not, however, portrayed this definition in all its beauty, being content to insist that no feature of criminal procedure and punishment can be omitted, because any one of these features may be taken by the courts to indicate, in case of doubt, that the procedure is a criminal one and follows upon a crime. In short, a crime is an act capable of being followed by criminal proceedings having a criminal outcome, and a proceeding or its outcome is criminal if it has certain characteristics which mark it as criminal. In a marginal case the court may have to balance one feature, which may suggest that the proceeding is criminal, against another feature, which may suggest the contrary. The features actually taken by the courts as indicative of crime, and the particular problems that arise in classifying proceedings, must be left for discussion on another occasion.

[46] *E.g.*, Winfield, *Province of the Law of Tort* (Cambridge, 1931), p. 201.
[47] *E.g.*, Lord Wright in *Amand* v. *Home Secretary* [1943] A.C. 147 at 162.

# 8

# PRIVITY OF CONTRACT

ERNEST H. SCAMELL

THE present lecture is concerned with one aspect of the law of contract. Given that a contract exists, two important questions which arise are first, 'Who can enforce the contract?' and secondly, 'Who is bound by the contract?' It is with the answers to each of these two questions that the doctrine of privity of contract is concerned. I think it must be true to say that all developed legal systems have a law of contract. Equally all such systems have to provide answers to the two questions with which privity of contract is concerned; and this matter of privity is, therefore, one of some general interest. Needless to say, however, the doctrine has been accorded different spheres of operation not only from one legal system to another but also from time to time as the underlying theory of contract has developed.

In English law, the doctrine of privity of contract has recently been subjected to a judicial X-ray examination and found by Lord Justice Denning to be of rather a weak constitution in certain respects. In addition, the doctrine seems of late to have developed a growth of a rather subtle and rare character which is known by some specialists as a clog or fetter. It is in these circumstances that it seemed to me to be fitting to say something tonight about privity of contract.

There are two distinct aspects of the doctrine of privity: the benefit aspect and the burden aspect, and I propose to take each of these in turn.

## THE BENEFIT OF A CONTRACT

To deal first with the *benefit* of a contract, it was laid down in the well-known case of *Tweddle* v. *Atkinson*[1] that 'no stranger to the consideration can take advantage of a contract, although made for his benefit', and in *Dunlop Pneumatic Tyre Co.* v. *Selfridge & Co., Ltd.*,[2] Viscount Haldane, L.C., uttered the

[1] (1861) 1 B. & S. 393.
[2] [1915] A.C. 847 at 853.

following famous words: 'In the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a *jus quaesitum tertio* arising by way of contract. Such a right may be conferred by way of property, as, for example, under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract *in personam*'. The principle thus enunciated has for the most part been treated by the courts and text writers as inviolable, but it has by no means escaped criticism. A poignant illustration of the way in which it works was provided by the case of *Vandepitte* v. *Preferred Accident Insurance Corporation of New York*.[3] In this case, the appellant, Miss Vandepitte, was injured in a collision with a motor car driven by a Miss Berry. In an action against Miss Berry for negligent driving, Miss Vandepitte recovered damages and costs but upon execution issuing, it was returned unsatisfied. Miss Vandepitte then brought an action against the defendant Insurance Company seeking to recover from them the amount of the judgment awarded against Miss Berry. The question was, therefore, whether Miss Berry was insured with the Company; for if she was, it was admitted that the Company would be liable. Miss Berry, however, was not herself a policy-holder of the Company; but her father held a policy the last clause of which provided that the benefit of the policy should be available to any person driving the father's car with his permission. It was common ground that Miss Berry was, at the time of the accident, in fact driving her father's car with his consent and the question was whether, in the circumstances, the policy was enforceable by Miss Berry. The Judicial Committee of the Privy Council held that Miss Berry, being no party to the policy effected by her father, could not enforce it notwithstanding that she was a person who fell within its express terms. In the result, therefore, Miss Vandepitte lost her action against the defendant Company.

In a critical review of this decision,[4] a commentator has described it as 'a conflict between the logic of the law and the requirements of everyday life' and condemned it as 'an admission that the law cannot adjust itself to the altered require-

[3] [1933] A.C. 70.
[4] See 49 *Law Quarterly Review* (1933), p. 474.

ments of modern conditions without legislative assistance'. This was little short of a challenge to the Judiciary and one which has not passed unheeded. In *Smith & Snipes Hall Farm Ltd.* v. *River Douglas Catchment Board*,[5] Lord Justice Denning attacked the authority of *Tweddle* v. *Atkinson* and in *Drive Yourself Hire Co. (London) Ltd.* v. *Strutt*,[6] consolidated his position. In the last-mentioned case, Lord Justice Denning, in the course of his judgment, said[6]: 'It is often said to be a fundamental principle of our law that only a person who is a party to a contract can sue on it. I wish to assert, as distinctly as I can, that the common law in its original setting knew no such principle. Indeed it said quite the contrary. For the 200 years before 1861 it was settled law that, if a promise in a simple contract was made expressly for the benefit of a third person in such circumstances that it was intended to be enforceable by him, then the common law would enforce the promise at his instance, although he was not a party to the contract'. Later in his judgment, Lord Justice Denning went on to say: 'In 1861, however, came the unfortunate case of *Tweddle* v. *Atkinson*, in which the Court of Queen's Bench departed from the law as it has been understood for the previous 200 years and held quite generally that no stranger can take advantage of a contract, though made for his benefit: and that was assumed, without argument, to be the law by the House of Lords in *Dunlop Pneumatic Tyre Co., Ltd.* v. *Selfridge & Co., Ltd.* I do not pause to consider whether this new rule was legitimately introduced into the law. Incidentally, the courts of the United States have not adopted this new rule. They have followed the original common law, which is much more in accord with the needs of a civilised society. So is the Scots law'.

It is fitting to observe that these observations were made *obiter*; but it is always improvident to disregard or condemn out of hand any observation emanating from the Bench, particularly when fortified by the learning of Lord Justice Denning and the 'needs of a civilised society', and in these circumstances two questions fall to be considered. First, the state of the common law doctrine of privity before 1861, and secondly, the probable future judicial attitude to the doctrine.

[5] [1949] 2 K.B. 500 at 514.
[6] [1954] 1 Q.B. 250 at 272.

the general rule of privity enunciated in *Tweddle* v. *Atkinson* and adopted by the House of Lords in *Dunlop Pneumatic Tyre Co.* v. *Selfridge & Co., Ltd.*, is likely to continue to represent the law until the legislature intervenes.

In these circumstances it falls to consider what are the true limits of the doctrine of privity. There are few general principles of law which are exceptionless and it is always necessary to keep an observant eye on the exceptions which exist to a general rule, since it may well happen that whilst the general rule remains dormant, the exceptions to it multiply and develop until it becomes necessary to consider whether the order of things has not been reversed so that the exceptions become more important than the general rule.

The exceptions to the rule that the benefit of a contract cannot be conferred upon a person who is not a party thereto comprise both statutory and non-statutory cases.

## NON-STATUTORY EXCEPTIONS TO THE BENEFIT ASPECT OF PRIVITY

The non-statutory exceptions constitute a rather mixed collection, but they do, I think, exhibit one common characteristic, namely that they all originate from some branch of the law outside the general law of contract and, from the historical point of view, have, for the most part, been developed by courts other than the common law courts.

### *1. Mercantile Exceptions*

I have referred earlier to a judgment of Lord Justice Denning in which he expressed the view that the principle of privity was not 'in accord with the needs of a civilised society'. There are several well defined transactions by which the truth of this statement might be illustrated. It is, for example, generally accepted that such a common and vital commercial arrangement as a Banker's Commercial Credit is probably unenforceable by the person in whose favour the credit is opened because of the operation of the principle.[19] In an earlier age, merchants virtually made their own law, so that to a very large extent,

[19] See the Sixth Interim Report of the Law Revision Committee (1937), at p. 28; but see also the observations of Denning, L.J., in *Smith & Snipes Hall Farm Ltd.* v. *River Douglas Catchment Board, supra.*

whatever commercial convenience dictated was translated into law by the Courts Merchant. It was thus that the doctrine of negotiability was invented and became so important an exception to the privity rule. Thus, for example, a cheque can, subject to compliance with certain formalities, be enforced, in general, by any person into whose hands the cheque comes. The law relating to bills of exchange is now embodied in the Bills of Exchange Act, 1882, but the general principle of negotiability remains part of what is now the common law.[20]

*2. Equitable Exceptions*

(a) *Contracts creating a trust.* Equity has always looked at things differently from the common law. At common law, the question has always been, 'Can the plaintiff show a right?' In equity, however, the prime consideration was, 'Is the defendant duty-bound in conscience?' Thus, if A transfers property to B to hold in trust for C, equity will allow C to enforce the trust, not, basically because the transaction as such confers any rights upon C, but because B ought, in conscience, to carry out the terms of the trust; and it is only incidentally that C acquires rights. Similarly, if A promises B to do something for the benefit of C and the circumstances are such that a trust is created, C will be able to enforce the promise, not at common law in contract but in equity under a trust.[21] The difficulty is, however, to determine in any particular case whether or not a trust exists.[22] In *Re Schebsman,*[23] du Parcq, L.J., said: 'Unless an intention to create a trust is clearly to be collected from the language used and the circumstances of the case, I think that the Court ought not to be astute to discover indications of such an intention'. Further, as the Law Revision Committee have pointed out, 'apart from the major disadvantages of uncertainty, the remedy dependent on a trust involves certain procedural difficulties'.[24] Notwithstanding these limitations, how-

20 See *The Bechuanaland Exploration Co., Ltd.* v. *The London Trading Bank Ltd.* [1898] 2 Q.B. 658.

21 See *Tomlinson* v. *Gill* (1756) Amb. 330; *Gandy* v. *Gandy* (1885) 30 Ch.D. 57; *Harmer* v. *Armstrong* [1934] 1 Ch. 65; *Les Affréteurs Réunis Société Anonyme* v. *Walford* [1919] A.C. 801; *Re Flavell* (1883) 25 Ch.D. 89.

22 See Glanville Williams' article in 7 *Modern Law Review* (1944), p. 123, and Corbin's in 46 *Law Quarterly Review* (1930), pp. 12–45.

23 [1944] Ch. 83 at 104.

24 Sixth Interim Report, p. 28.

the general rule of privity enunciated in *Tweddle* v. *Atkinson* and adopted by the House of Lords in *Dunlop Pneumatic Tyre Co.* v. *Selfridge & Co., Ltd.,* is likely to continue to represent the law until the legislature intervenes.

In these circumstances it falls to consider what are the true limits of the doctrine of privity. There are few general principles of law which are exceptionless and it is always necessary to keep an observant eye on the exceptions which exist to a general rule, since it may well happen that whilst the general rule remains dormant, the exceptions to it multiply and develop until it becomes necessary to consider whether the order of things has not been reversed so that the exceptions become more important than the general rule.

The exceptions to the rule that the benefit of a contract cannot be conferred upon a person who is not a party thereto comprise both statutory and non-statutory cases.

### NON-STATUTORY EXCEPTIONS TO THE BENEFIT ASPECT OF PRIVITY

The non-statutory exceptions constitute a rather mixed collection, but they do, I think, exhibit one common characteristic, namely that they all originate from some branch of the law outside the general law of contract and, from the historical point of view, have, for the most part, been developed by courts other than the common law courts.

#### *1. Mercantile Exceptions*

I have referred earlier to a judgment of Lord Justice Denning in which he expressed the view that the principle of privity was not 'in accord with the needs of a civilised society'. There are several well defined transactions by which the truth of this statement might be illustrated. It is, for example, generally accepted that such a common and vital commercial arrangement as a Banker's Commercial Credit is probably unenforceable by the person in whose favour the credit is opened because of the operation of the principle.[19] In an earlier age, merchants virtually made their own law, so that to a very large extent,

[19] See the Sixth Interim Report of the Law Revision Committee (1937), at p. 28; but see also the observations of Denning, L.J., in *Smith & Snipes Hall Farm Ltd.* v. *River Douglas Catchment Board, supra.*

whatever commercial convenience dictated was translated into law by the Courts Merchant. It was thus that the doctrine of negotiability was invented and became so important an exception to the privity rule. Thus, for example, a cheque can, subject to compliance with certain formalities, be enforced, in general, by any person into whose hands the cheque comes. The law relating to bills of exchange is now embodied in the Bills of Exchange Act, 1882, but the general principle of negotiability remains part of what is now the common law.[20]

*2. Equitable Exceptions*

(a) *Contracts creating a trust.* Equity has always looked at things differently from the common law. At common law, the question has always been, 'Can the plaintiff show a right?' In equity, however, the prime consideration was, 'Is the defendant duty-bound in conscience?' Thus, if A transfers property to B to hold in trust for C, equity will allow C to enforce the trust, not, basically because the transaction as such confers any rights upon C, but because B ought, in conscience, to carry out the terms of the trust; and it is only incidentally that C acquires rights. Similarly, if A promises B to do something for the benefit of C and the circumstances are such that a trust is created, C will be able to enforce the promise, not at common law in contract but in equity under a trust.[21] The difficulty is, however, to determine in any particular case whether or not a trust exists.[22] In *Re Schebsman,*[23] du Parcq, L.J., said: 'Unless an intention to create a trust is clearly to be collected from the language used and the circumstances of the case, I think that the Court ought not to be astute to discover indications of such an intention'. Further, as the Law Revision Committee have pointed out, 'apart from the major disadvantages of uncertainty, the remedy dependent on a trust involves certain procedural difficulties'.[24] Notwithstanding these limitations, how-

20 See *The Bechuanaland Exploration Co., Ltd.* v. *The London Trading Bank Ltd.* [1898] 2 Q.B. 658.

21 See *Tomlinson* v. *Gill* (1756) Amb. 330; *Gandy* v. *Gandy* (1885) 30 Ch.D. 57; *Harmer* v. *Armstrong* [1934] 1 Ch. 65; *Les Affréteurs Réunis Société Anonyme* v. *Walford* [1919] A.C. 801; *Re Flavell* (1883) 25 Ch.D. 89.

22 See Glanville Williams' article in 7 *Modern Law Review* (1944), p. 123, and Corbin's in 46 *Law Quarterly Review* (1930), pp. 12–45.

23 [1944] Ch. 83 at 104.

24 Sixth Interim Report, p. 28.

ever, my view is that the trust presents opportunities for the avoidance of the consequences of the common law rule of privity of which full advantage has yet to be taken. So far as the difficulty of uncertainty is concerned, this is not peculiar to the concept of a trust for even in those systems of law where a third person *is* permitted to sue on a contract to which he is not a party, it must be shown that the parties to the contract *intended* to benefit the third party. Thus, for example, Article 112 (2) of the Swiss *Code des Obligations,* which relates to *Stipulations pour Autrui,* requires that the intention to benefit the third party be expressly or impliedly shown in the contract. To invoke the operation of the doctrine of trusts into a written contract is, it is submitted, little more, in most cases, than a question of drafting.

(b) *Assignment.* The second equitable exception to the rule lies in the recognition of the assignment of contractual rights. This exception is, perhaps, more apparent than real, since where the subject-matter of an assignment is a legal right, it is still necessary for the assignee to join the assignor either as co-plaintiff with himself or as co-defendant with the obligor.[25]

### 3. *Covenants running with an Estate in Land*

Whatever may have been the common law rule of privity in simple contracts, it seems clear that with contracts under seal (and subject to certain exceptions[26]) the general rule of privity applied.[27] Nevertheless, the needs of the law of real property have given rise to an important class of exceptions with the result that certain covenants entered into on the occasion of a sale or lease of land will pass to successors in title. The law on this subject has been developed over more than six centuries and is highly technical, but the general principle is that in leases the benefit of covenants which have reference to the subject-matter run both with the leasehold estate and the freehold reversion as the case may be[28]; whilst in the case of covenants imposed upon the owner of a freehold estate for the benefit of other

[25] See *Bowden's Patents Syndicate Ltd.* v. *Herbert Smith & Co.* [1904] 2 Ch. 86; *Holt* v. *Heatherfield Trust Ltd.* [1942] 2 K.B. 1.

[26] See, *e.g., Chelsea & Walham Green Building Society* v. *Armstrong* [1951] Ch. 853.

[27] See *Carnegie* v. *Waugh* (1823) 2 Dowl. & Ry. K.B. 277.

[28] See *Spencer's Case* (1583) 5 Coke 16 (a) and section 141 of the Law of Property Act, 1925.

defined land, the benefit may pass to successors in title of that land.[29] Further, the benefit of such covenants may be expressly assigned *at law*.[30]

It was not difficult for the law of real property to engraft these exceptions on to the principle of privity since covenants relating to land bear a superficial resemblance to easements and to the old common law doctrine of warranties, and many of the rules of these were extended by analogy to covenants.[31]

*4. Death*

Assuming that a contract is not one which is terminated on death, the benefit of it will pass to the deceased's personal representatives if such a result is consistent with the terms of the contract.[32] This exception is based upon ideas borrowed from the Roman conception of inheritance.

*5. Bankruptcy*

The right to enforce all contracts which are not purely personal to the bankrupt passes to his trustee in bankruptcy.[33]

*6. Agency*

I think I have mentioned at least the more important of the non-statutory exceptions to the privity rule. I must, however, add a word about agency in this connection, and first, about the position of an undisclosed principal. It is a well-established rule of English law (though, I think, not of many other systems of law) that a principal may, in certain circumstances, sue upon a contract entered into by his agent although the other party to the contract entered into it in ignorance of the existence of the agency.[34] Sir Frederick Pollock has criticised this recognition of the undisclosed principal on the ground that it offends the rule of privity.[35] Strictly speaking, however, it would seem that if, although undisclosed, a principal is recognised by the law of

29 See 'Positive Covenants in Conveyances of the Fee Simple' (1954) 18 *The Conveyancer and Property Lawyer*, pp. 546–564.
30 See *Shayler* v. *Woolf* [1946] Ch. 320.
31 See Holmes, *The Common Law*, p. 378 *et seq.*
32 See *Marshall* v. *Broadhurst* (1831) 1 Cr. & J. 403; *Langstone* v. *Hayes* [1946] 1 All E.R. 114.
33 See *Beckham* v. *Drake* (1849) 2 H.L.Cas. 579.
34 See *Schrimshire* v. *Alderton* (1783) 2 Stra. 1182; *Keighley Maxsted & Co.* v. *Durant* [1901] A.C. 240.
35 See 3 *Law Quarterly Review* (1887), p. 359.

agency as such, then he is in fact a party to the contract and the rule of privity is satisfied.[36]

Secondly, it appears that by a kind of inverted rule of agency, where there is a contract which contains an exemption clause exempting a person from liability in negligence, then the servants or agents of that person who act under that contract may have the benefit of the exemption clause. In other words they can claim the protection of the contract made with their employers on whose behalf they are acting.[37]

### STATUTORY EXCEPTIONS TO THE BENEFIT ASPECT OF PRIVITY

Despite the recommendation of the Law Revision Committee made in 1937 that where a contract by its express terms purports to confer a benefit directly on a third party, it should be enforceable by the third party in his own name, no legislative change in the law has yet taken place. From time to time the Legislature has, however, alleviated the general position by a certain amount of piecemeal legislation. For the most part, this legislation has related to policies of insurance. It seems that in most legal systems where the principle of privity is recognised to a greater or less extent, insurance exceptions usually exist, although only certain classes of insurance are affected.[38] In England, special statutory provision has been made in respect of policies of motor insurance,[39] family life insurance,[40] marine insurance[41] and fire insurance.[42]

In addition to such cases, however, a more general exception is contained in section 56 (1) of the Law of Property Act, 1925. This section provides that: 'A person may take an immediate or other interest in land or other property, or the benefit of any condition, right of entry, covenant or agreement over or respecting land or other property, although he may not be named as a party to the conveyance or other instrument'. Ever since 1926,

[36] See H. G. Hanbury, *The Principles of Agency* (1952), p. 167.
[37] See *Elder, Dempster & Co.* v. *Paterson, Zochonis & Co.* [1924] A.C. 522; but see *Adler* v. *Dickson and Another* [1954] 3 All E.R. 21.
[38] See, for example, Article 113 of the Swiss *Code des Obligations,* and section 60 of the Swiss Insurance Contracts Act of 1908; paragraph 329 of the German *Bürgerliches Gesetzbuch,* and section 67 of the French Insurance Contracts Act of 1930.
[39] Section 36 of the Road Traffic Act, 1930.
[40] Section 11 of the Married Women's Property Act, 1882.
[41] Section 14 (2) of the Marine Insurance Act, 1906.
[42] Section 47 (1) of the Law of Property Act, 1925.

controversy has raged over the true scope and effect of this provision. In *Re Foster*,[43] Crossman, J., said that he was not prepared to hold that the section had created such an enormous change in the law of contract as would be involved in the proposition that an agreement by A with B to pay money to C gave C a right to sue on the contract.[44] On the other hand, Lord Justice Denning has recently said of the section, 'I can think of no words more apt to do away with the rule in *Tweddle* v. *Atkinson* . . . in cases respecting property'.[45] Shortly stated, the facts in *Strutt's Case* were that in 1931 A granted a lease for a term of 20 years to B containing a covenant on the part of B not to assign, underlet or part with possession of the premises without the consent of A. In 1932 A gave his consent to B for the granting by B of a sub-lease to C. This sub-lease itself contained a covenant by C not to assign the sub-lease without the consent of A who, however, was not a party to the sub-lease. In 1937 C assigned the sub-lease to D with the consent of A, but in 1951 D assigned it to E without obtaining A's consent, whereupon A sought to recover possession from E on the ground that the assignment was unlawful. There were rent restriction complications in the case, and in the Court of Appeal Lords Justices Somervell and Romer decided the case on a narrow ground. Lord Justice Denning, however, based his judgment broadly on section 56 of the Law of Property Act, 1925, holding that this section enabled A to take the benefit of the covenant against assigning without A's consent contained in the sub-lease, although he was not named as a party to the sub-lease. Although the other two Lords Justices made no reference to section 56, the application of it to the particular facts was in accord with the decision of Dankwerts, J., in *Stromdale & Ball Ltd.* v. *Burden*.[46] But the general statement of Lord Justice Denning that the section has done away with the rule in *Tweddle* v. *Atkinson* in cases respecting property seems to require qualification in at least two respects. In the first place, it is clear that the section can only operate where there is either a deed (as in the two cases just mentioned) or an instrument in writing. It would not, therefore,

[43] [1938] 3 All E.R. 357.
[44] See also *Re Sinclair's Life Policy* [1938] 3 All E.R. 124.
[45] In *Drive Yourself Hire Co. (London) Ltd.* v. *Strutt* [1954] 1 Q.B. 250 at 274.
[46] [1952] Ch. 223.

apply to an oral agreement. Secondly, the rule in *Tweddle* v. *Atkinson* is double-headed and includes not only the privity rule but also the rule that consideration must move from the promisee, and it is submitted that section 56 has done nothing to modify this latter rule. That the two rules are distinct was recognised by the Law Revision Committee in their report on the doctrine of consideration, where the distinction is illustrated by reference to the following example: 'A, B and C are all parties to a contract. A promises B and C to pay C £100 if B will do a certain piece of work desired by A. A declines to pay the £100 and C cannot compel him to do so'. The reason is that although C is a party to the contract, the consideration does not move from him but from B. It therefore seems that apart from a few exceptional cases, section 56 can only be relied upon where there is a covenant or agreement under seal—and such cases are comparatively rare in the ordinary everyday type of contract. I think I am right in saying that in all the cases where section 56 has been held to apply, the covenant or agreement relied upon has been under seal so that the question has never arisen.[47] In this connection it is to be noted that all the instances of non-statutory exceptions to the rule of privity to which I have referred earlier are also examples of exceptions to the rule that consideration must move from the promisee; whilst in the case of the statutory insurance exceptions, the enacting words confer a positive right upon the third parties and are not framed in negative terms as in the case of section 56 ('although he may not be named as a party to the conveyance or other instrument'). For these reasons it is submitted that section 56 is much more limited in its application than Lord Justice Denning has indicated.

The last statutory exception which I shall mention is contained in section 136 of the Law of Property Act, 1925. This section re-enacts section 25 (6) of the Judicature Act, 1873, which made possible, upon certain conditions being satisfied, a legal assignment of a contractual right, such as a debt.[48]

Having thus reviewed the more important exceptions to the

[47] See, *e.g.*, *Drive Yourself Hire Co. (London) Ltd.* v. *Strutt*, *supra*; *Stromdale & Ball Ltd.* v. *Burden* [1952] Ch. 223; *Smith & Snipes Hall Farm Ltd.* v. *River Douglas Catchment Board* [1949] 2 K.B. 500; *Re Ecclesiastical Commissioners for England's Conveyance* [1936] Ch. 430; *Dyson* v. *Forster* [1909] A.C. 98.

[48] See *Holt* v. *Heatherfield Trusts Ltd.* [1942] 2 K.B. 1; *Re Westerton* [1919] 2 Ch. 104.

rule that a stranger to a contract cannot sue on it, it cannot be doubted that the rule continues to have a very influential hold on the operation of contracts and particularly of contracts not under seal. The Law Revision Committee have recommended reform along similar lines to that brought about by the Judicature Act, 1873, in the assignability of contractual rights. The Committee conclude: 'In our view it is desirable that the third party should become privy to the contract, his position being more analogous to that of an assignee of a contractual right than to that of a *cestui que trust*'.[49] After the experiences of section 56 (1) of the Law of Property Act, 1925, it is to be hoped that if and when the desired reform comes it will be expressed in a language which lawyers (if not laymen) can understand!

### THE BURDEN OF A CONTRACT

The second aspect of the doctrine of privity is that a contractual obligation cannot in general be enforced against a stranger to the contract. The leading case illustrating this is *Taddy & Co.* v. *Sterious & Co.*[50] Taddy & Co., who were manufacturers of packet tobacco, desired that the tobacco should not be sold by retailers below a fixed minimum price. They accordingly printed conditions on each packet stating that 'acceptance of the goods will be deemed a contract between the purchaser and Messrs. Taddy & Co. that he will observe these stipulations'. Taddy & Co. sold packets of tobacco to Messrs. Nutter, a wholesale dealer, who resold them to the defendant, a retail tobacconist. The defendant resold the tobacco below the fixed price and Taddy & Co. brought an action for a declaration that the printed conditions were binding on the defendant. Swinfen Eady, J., disposed of the privity issue in two sentences, saying,[51] 'Conditions of this kind do not run with the goods and cannot be imposed upon them. Subsequent purchasers, therefore, do not take them subject to any conditions which the Court can enforce'. Similarly, it is well established that a party cannot assign his liabilities under a contract without the consent of the other party.[52]

[49] Sixth Interim Report, p. 29.
[50] [1904] 1 Ch. 354.
[51] *Ibid.*, at p. 358.
[52] See *Robson* v. *Drummond* (1831) 2 B. & Ad. 303.

EXCEPTIONS TO THE BURDEN ASPECT OF PRIVITY

It would seem that the only 'pure' exceptions to the burden aspect of privity occur in the case of an involuntary assignment of contractual liability such as occurs on death, bankruptcy or lunacy.[53] Such other exceptions as exist relate to property.

First, conditions attached to a patented article may be enforceable against persons having notice of the conditions at the time of the sale.[54]

Secondly, by section 64 (2) of the Law of Property Act, 1925, a statutory acknowledgment for the production of title deeds is binding on every person having possession or control of the documents.

Thirdly, covenants contained in a lease which have reference to the subject-matter are enforceable against the assignees of the landlord[55] and of the tenant.[56]

Fourthly, restrictive covenants relating to land, whether entered into on the occasion of a sale or a lease, are enforceable, subject to certain conditions, against all persons who occupy the land.[57]

Fifthly, a contractual licence conferring a right of exclusive occupation of land[58] may in certain circumstances be enforceable against a devisee,[59] a trustee in bankruptcy[60] and a collusive purchaser.[61]

Lastly, any contract for the transfer or creation of an interest in land may, subject to certain limitations, be enforced against all owners of the land, since such a contract is regarded, in equity, as immediately creating an interest in the land.[62]

In all these cases, the original right has become something more than a contractual right; it has in fact become a proprietary interest in the property to which it relates. Thus, the lease, the restrictive covenant and the occupational licence all

[53] See *Langstone* v. *Hayes* [1946] 1 All E.R. 114; *Bendall* v. *McWhirter* [1952] 2 Q.B. 466.
[54] See *Columbia Gramophone Co.* v. *Murray* (1922) 39 R.P.C. 239.
[55] See section 142 of the Law of Property Act, 1925.
[56] See *Spencer's Case* (1583) 5 Coke 16 (a).
[57] *Tulk* v. *Moxhay* (1848) 2 Ph. 774; *Re Nisbet & Potts' Contract* [1905] 1 Ch. 391; *Lord Strathcona S.S.* v. *Dominion Coal Co.* [1926] A.C. 108.
[58] As to ships, see *Lord Strathcona S.S.* v. *Dominion Coal Co.* [1926] A.C. 108 and *Greenhalgh* v. *Mullard* [1943] 2 All E.R. 234 at 239.
[59] *Errington* v. *Errington* [1952] 1 K.B. 290.
[60] *Bendall* v. *McWhirter* [1952] 2 Q.B. 466.
[61] *Ferris* v. *Weaven* [1952] 2 All E.R. 233.
[62] *Hutton* v. *Watling* [1948] Ch. 26.

started off their careers as being merely contractual rights between the parties, but each has since become recognised as a proprietary interest of some sort: the lease has become a legal estate; the restrictive covenant an equitable interest; the occupational licence a clog or fetter. The point I am trying to illustrate is that the burden aspect of the privity rule is in fact fundamental to the contractual relationship. Once a right arising out of a contract respecting property is accorded a wider degree of enforceability than against the immediate contracting party, then to that extent it has assumed proprietary characteristics. This is of fundamental importance since there are many rules of property which do not apply to mere contractual rights, such as the perpetuity rule.[62]

The transition from a purely contractual right to a proprietary right is at present taking place in the case of the contractual licence to occupy land. The development is taking place in equity and not at law, and accordingly once it is held that such a licence is enforceable against everybody taking the land other than a bona fide purchaser of the legal estate who takes for value and without notice the transition will be complete. In *Errington* v. *Errington* and *Bendall* v. *McWhirter,* Lord Justice Denning has indeed given it as his opinion that an occupational licence has reached this degree of enforceability and Dr. Cheshire has drawn the logical conclusion,[63] but the actual decisions do not seem at the present time to go quite so far.[64] If, as seems to be the case, the occupational licence has drifted away from its purely contractual moorings but has not yet found its proprietary moorings, a new situation has arisen which calls for new terminology, and the descriptive terms of 'clog' or 'fetter' have been coined to provide for this hybrid and perhaps transitional situation of the licence.

## CONCLUSION

The concluding thoughts upon which I would bring this lecture to a close are very simple. First, that the benefit aspect of the rule of privity has outlived its *raison d'être.* Secondly, the rule cannot be abrogated directly by the courts but should give way

[63] See 16 *Modern Law Review* (1953), p. 1.
[64] See 'Digesting the Licence', 31 *Canadian Bar Review* (1953), p. 847 *et seq.*

to a general *statutory* exception. The rule that consideration must move from the promisee would require alteration at the same time. Thirdly, that the burden aspect of the rule is fundamental to the conception of contract and that where a wider measure of enforceability is available, the right so enforced is not merely a contractual right but a proprietary right or, at least, something approaching a proprietary right.

# 9

# INSURANCE LAW REVISION

E. R. H. Ivamy

In 1906 the law relating to marine insurance was codified,[1] and in 1930 motorists were required for the first time to insure against third party risks.[2] But with these two exceptions no substantial revision of insurance law has taken place during the last fifty years, and perhaps the time has now come to consider whether any amendments of the existing law are required in the light of present day circumstances.[3] Many aspects of the subject might be chosen for inquiry, but in this paper the following matters only have been selected for discussion: (1) the prominence of clauses in insurance policies; (2) standardised clauses; (3) the form of the marine insurance policy; (4) proposal forms; and (5) repudiation of liability on the ground of breach of condition.

## THE PROMINENCE OF CLAUSES IN INSURANCE POLICIES

In English law there is nothing to compel an insurance company to draw the attention of the insured to any of the clauses inserted in the policy. In the absence of fraud or the plea of *non est factum*,[4] the insured is deemed to have contracted on the terms set out therein, though these may have to be interpreted in the light of the proposal form and the cover note if one is issued.[5] The insured, however, is afforded one protection, and that is that if there is any ambiguity in the wording, the *contra proferentem* rule will be applied, and doubts will be resolved in his favour, for the insurance company frames the policy and inserts the exceptions.[6] But this rule is only applied for the purpose of

1 Marine Insurance Act, 1906.
2 Road Traffic Act, 1930.
3 In 1954 the matter was referred to the Law Reform Committee; Lord Chancellor's Office Press Notice, dated July 30. No report has yet been published.
4 *L'Estrange* v. *F. Graucob Ltd.* [1934] 2 K.B. 394.
5 As in *Houghton* v. *Trafalgar Insurance Co., Ltd.* [1953] 2 Lloyd's Rep. 18; on appeal [1953] 2 Lloyd's Rep. 503.
6 *English* v. *Western* [1940] 2 K.B. 156; *Lake* v. *Simmons* [1927] A.C. 487; *Provincial Insurance Co., Ltd.* v. *Morgan* [1933] A.C. 240; *Yorke*

removing a doubt, not for the purpose of creating a doubt, or magnifying an ambiguity, when the circumstances of the case raise no real difficulty,[7] nor will it be used if the meaning becomes clear when the policy is read as a whole.[8]

If the words are not ambiguous, the size of the print in which they are expressed is not material. In some cases it may be argued that the clause is illegible by reason of the fineness of the print and therefore void, but the courts have expressed fear of the doctrine that the clauses should be disregarded merely because they are difficult to read, though there may be extreme cases.[9] It is not, of course, suggested that all insurance companies have ulterior motives in putting in fine print clauses, or that they often invoke them; though it is possible that these may be considered 'reserve points' on which to base a defence, if they consider that an insured is submitting a fraudulent claim. Nevertheless, it may be argued that there is something to be said for new legislation requiring that all clauses should be put in equal size print whatever their nature. A partial precedent for this can be found in the Hire-Purchase Act, 1938, which provides that the note or memorandum of a hire purchase agreement[10] must contain a notice concerning the right of termination by the hirer, and the restriction of the owner's right to recover the goods, which is at least as prominent as the rest of the contents of the note or memorandum.[11] It is not suggested, however, that an attestation clause should be appended, as in the case of an absolute bill of sale, wherein it must be stated that the effect of the document has been explained to the insured by the attesting solicitor![12] In some American States the size of print in policies

v. *Yorkshire Insurance Company Ltd.* [1918] 1 K.B. 662. Sometimes in the case of marine policies the maxim can be employed in favour of the underwriter: *A/S Ocean* v. *Black Sea & Baltic General Insurance Co., Ltd.* (1935) 51 Ll.L.Rep. 305.

7 *Cornish* v. *Accident Insurance Co., Ltd.* (1889) 23 Q.B.D. 453 at 456 (*per* Lindley, L.J.).

8 *Passmore* v. *Vulcan Boiler & General Insurance Co., Ltd.* (1936) 154 L.T. 258; *Yorkshire Insurance Co., Ltd.* v. *Campbell* [1917] A.C. 218.

9 *Koskas* v. *Standard Marine Insurance Co., Ltd.* (1927) 137 L.T. 165 at 168 (*per* Scrutton, L.J.).

10 Within the financial limits of the Act of 1938 as amended by the Hire-Purchase Act, 1954, *viz.*, £1,000 in the case of an agreement relating to livestock, and £300 in any other case. See generally E. R. Hardy Ivamy, 'The Control of Hire-Purchase' (1954) 21 *The Solicitor*, p. 162, and 'Some Aspects of Hire-Purchase Law' (1954) 21 *The Solicitor*, p. 242.

11 Hire-Purchase Act, 1938, s. 2 (2) (*c*) and Sched.

12 Bills of Sale Act, 1878, s. 10; *Re Haynes, ex p. National Mercantile Bank* (1880) 15 Ch.D. 42.

is controlled by statute,[13] and has been so in New York since 1909.[14]

An alternative method is to require the insurance company to put certain clauses in a distinctive coloured ink. In *Houghton* v. *Trafalgar Insurance Co., Ltd.*,[15] the question to be decided was the interpretation of a clause whereby the defendants' liability was to be excluded for 'loss, damage etc. . . . caused or arising whilst [the] car is . . . conveying any load in excess of that for which it was constructed'. The defendants' case was that 'load' meant not 'weight carried', as the plaintiff contended, but that the load was exceeded if the vehicle was carrying more passengers than it was constructed ordinarily to carry. The *contra proferentem* rule was applied, and judgment given against the company on the ground that the clause was neither clear nor unambiguous. Somervell, L.J., went so far as to say that if this or any other insurance company wished to put forward a policy which would be inapplicable when an extra passenger was carried, he hoped that they would print that provision in red ink so that the insured would have it drawn to his particular attention.

Of special importance are clauses concerning the time by which claims for losses have to be made,[16] and a 'red-ink' provision for them might well be considered if new legislation is attempted. Others might be those concerning the conduct of litigation arising out of the event insured against, reinstatement rights, and the methods to be applied in determining the loss.

## STANDARDISED CLAUSES

In the proposed amendments to the law that we have considered above, it is suggested that if the requirements as to size of print

[13] *E.g.*, California and Massachusetts.

[14] New York Insurance Law, 1909.

[15] *Supra*, note 5. For a discussion of this case, see E. R. Hardy Ivamy, 'The Overloading of Motor Vehicles' (1953) 103 *Law Journal*, p. 808. The defendants might have argued that the vehicle was unroadworthy through the alleged excessive load. See further E. R. Hardy Ivamy, 'An Insurer's Liability for Unroadworthy Vehicles' (1955) 99 *Solicitors' Journal*, p. 19.

[16] *E.g.*, as in *T. H. Adamson & Sons* v. *Liverpool & London & Globe Insurance Co., Ltd.* [1953] 2 Lloyd's Rep. 355. See E. R. Hardy Ivamy, '"Cash in Transit" Insurance Policies' (1954) 104 *Law Journal*, p. 133. But in this case, as the report shows, the insurers had given express warning of the 'notice' condition and the insured had replied by letter agreeing that it was reasonable.

and/or distinctive coloured ink were complied with, the insured should be bound by the terms of the policy, even if in fact he did not read them.

Another method of protecting the interests of the insured would be to arrange for policies of insurance to be expressed in standardised forms, and enact that if these forms were not complied with, the insurance company could not take advantage of any of the offending provisions, although the insured had read them.

Such standardised policies might be agreed on by the insurance companies and approved by special insurance commissioners appointed for the purpose. This method has already been adopted by a number of the American States in respect of some types of policies. In Canada statutory conditions are provided for policies relating to life, marine, fire, automobile, accident, sickness, livestock and weather. But in many fields of insurance, *e.g.*, theft, no such statutory conditions exist. Multi-peril policies are being used more extensively than at one time, and difficulties have been experienced where some of the risks are subject to statutory conditions, while others are not, *e.g.*, in a comprehensive policy covering both fire and theft. Attempts have therefore been made to reclassify Canadian insurance in the following way: (a) property insurance; (b) liability insurance; (c) marine insurance; (d) insurance of the person, and (e) suretyship.[17]

In this country practically every non-marine insurance policy contains an arbitration clause. It might be said that this is unfair on a proposer, who finds that a company to which he applies sends him a policy containing such a clause, for he is virtually unable to go elsewhere. But arbitration has achieved such popularity in all branches of commercial life that it would perhaps be unreasonable for Parliament to single out insurance as a particular field in which an arbitration clause would not operate.[18] It is, however, to be observed that it is only in the case of fire insurance that the Canadian legislation contains a statutory condition requiring the parties to submit any dispute to

[17] Report of the Insurance Law Revision Committee.

[18] For the popularity of arbitration at the present time see Devlin, J., 'The Relation between Commercial Law and Commercial Practice' (1951) 14 *Modern Law Review*, p. 249.

arbitration.[19] In other cases they are free to choose their tribunal.

If legislation similar to that in Canada were introduced here, certain advantages might result. These would include: (1) the conditions would be fair to all parties concerned; (2) the terms would be certain and uniform; and (3) they could be reviewed at intervals. Amongst the disadvantages on the other hand would be: (1) unpopularity caused by interfering with the general freedom of contract open to insurance companies to insist on clauses which they find helpful in their operations; (2) the likelihood of litigation to interpret the terms in the standard contracts; and (3) the difficulty of choosing appropriate commissioners with the necessary amount of business experience.

### THE FORM OF THE MARINE INSURANCE POLICY

Criticisms of the usual form of marine insurance policy date back to the eighteenth century. In *Brough* v. *Whitmore*,[20] Buller, J., observed[21]: 'Without commenting on the words of the policy, it is sufficient to say that a policy of assurance has at all times been considered in courts of law as an absurd and incoherent instrument'. Again, in *Marsden* v. *Reid*,[22] we find Lawrence, J., saying: 'It is wonderful, considering how much property is at stake upon instruments of this description, that they should be drawn up with so much laxity as they are, and that those who are interested should not apply to some man whose habits of life and professional skill will enable him to adapt the words of the policy to the intention professed by the parties'. The learned judge said that in construing marine policies the Court must always look for what was the intention of the parties, without confining itself to a grammatical construction; for it was impossible in many instances so to construe them, without departing widely from the object intended. He found that a policy meant to cover a risk on goods only would have words relating for the most part to an insurance of a ship to which it would extend but for some loose 'memorandum'; and a policy meant to cover *respondentia* interest would contain no mention of *respondentia* interest except in the margin. In *Le Cheminant*

[19] Revised Statutes of Ontario, 1950, c. 183, s. 108.
[20] (1791) 4 T.R. 206.
[21] *Ibid.*, at p. 210.
[22] (1803) 3 East 572 at 578–579.

v. *Pearson*,[23] Mansfield, C.J., merely said[24] that the 'policy of insurance is a very strange instrument, as we all know and feel'.

In our own day the position has become more complicated, for it has become the practice to attach gummed slips to the customary form of policy setting out the Institute Clauses. Commenting on this practice, Mackinnon, L.J., in *Forestal Land, Timber & Railways Co., Ltd.* v. *Rickards*,[25] said that the truth was that the law of marine insurance was nothing more than a collection of rules for the construction of the ancient form of policy and such additions as were from time to time annexed to it, and, unhappily, tradition seemed to have caused them also in very many cases to be clumsy, imperfect and obscure. In *Atlantic Maritime Company Inc.* v. *Gibbon*,[26] Sellers, J., said that freight insurance entered into on the old form of policy with deletions and additions to adapt it to the intended contract had almost invariably given rise to difficulties of interpretation, and he did not regard this case as one of the exceptions. An echo of this sentiment is to be found in the American case of *Calmar Steamship Corporation* v. *Scott & Others: The Portmar*,[27] where Frankfurter, J., said that the policy had been assembled by imposing on the age-old Lloyd's form layer upon layer of warranties and riders. Warranties freed the underwriters from obligations imposed by riders, and subsequently riders then reimposed obligations thus avoided. Construing such conglomerate provisions required a skill not unlike that called for in the decipherment of obscure palimpsest texts. When *Atlantic Maritime Company Inc.* v. *Gibbon* reached the Court of Appeal,[28] Sir Raymond Evershed, M.R., said that he had no doubt that those engaged in this class of business found it convenient that their policies should take this form. But it could

[23] (1812) 4 Taunt. 367.
[24] *Ibid.*, at p. 380.
[25] [1941] 1 K.B. 225 at 246–247.
[26] [1953] 2 W.L.R. 725 at 733. Cf. the observations of Walton, J., in *Anglo Californian Bank Ltd.* v. *London & Provincial Marine & General Insurance Co., Ltd.* (1904) 10 Com.Cas. 1 at 9: 'It contains language which is appropriate to the particular insurance (which is a great deal more than you can say of ordinary Lloyd's marine policies) and is apt for the purpose of describing the risk which the underwriters take, and is not merely language containing words inserted in blanks which happen to occur here and there in a form which has to be construed with the assistance of usage and decisions of the Courts coupled with the words used'.
[27] [1953] 2 Lloyd's Rep. 485 at 488.
[28] [1954] 1 Q.B. 88 at 111.

not be denied that the effect produced was in some degree one of taking away with one hand what had been given by the other, and the task of the courts in construing the resultant document or documents was certainly rendered more difficult.

As was pointed out in that case, the numerous cases cited to the Court on the question of frustration do not make it easy to contend that those entering into this class of business well understand the meaning of the conventional accumulation of clauses which constitute the policy. In *Marten* v. *Vestey Brothers Ltd.*,[29] Lord Dunedin regretted that underwriters had not adopted separate forms of policy for ship, goods and freight insurance. Further, they had not in practice even taken the trouble when a policy was effected on one, to delete the phrases obviously only applying to the other two things which might be insured. But they left blanks in the policy, and those blanks were filled up so as to fix what was the subject insured, and additional clauses were often written on the margin or affixed to the policy by gum. Similarly in *Gunford Ship Co., Ltd.* v. *Thames & Mersey Marine Insurance Co., Ltd.*,[30] Lord Salvesen said that it had been conclusively established by the evidence that the name of the master was not inserted in the policy at all but was always left blank.[31]

On the other hand, it may be argued that if a new form of policy were adopted, 'the leading cases decided on the old form would cease to be binding precedents and the moment a dispute arose the whole business of litigation would begin again. . . . So far as the actual policy is concerned all parties know definitely to what it commits them'.[32] However, the form of the standard Lloyd's policy has been altered before, and the argument of antiquity can be advanced to stop all change. The Marine Insurance Act, 1906, provided a statutory code based on the common law decisions, and the efficiency of the draftsman is reflected in the paucity of cases interpreting the Act. A similar instance is provided by the Sale of Goods Act, 1893. There seems to be no logical reason why the necessary skill should not be forthcoming from the draftsman of the present day.

[29] [1920] A.C. 307 at 315. See also *Dudgeon* v. *Pembroke* (1877) 2 App.Cas. 284 as to when written words override the printed words of a policy.

[30] 1910 S.C. 1072.

[31] *Ibid.*, at p. 1084; see also [1911] A.C. 529 at 533 (*per* Lord Alverstone, C.J.).

[32] C. Wright and C. E. Fayle, *A History of Lloyd's* (1928), p. 131.

PROPOSAL FORMS

One of the cardinal rules of insurance law is that the assured must not make any misrepresentations, whether innocent or fraudulent, on any material point to induce the company into issuing the policy, and if he does so, the contract may be avoided at the instance of the company. A similar rule applies in the case of non-disclosure of any material fact by the assured. The reason for this is well stated by Scrutton, L.J., in *Rozanes* v. *Bowen*[33]: 'It has been for centuries in England the law in connection with insurance of all sorts . . . that, as the underwriter knows nothing and the man who comes to him to ask him to insure knows everything, it is the duty of the assured, the man who desires to have a policy, to make a full disclosure to the underwriters without being asked of all the material circumstances, because the underwriter knows nothing and the assured knows everything. That is expressed by saying that it is a contract of the utmost good faith—*uberrima fides*'.

The scope of materiality is defined by the Marine Insurance Act, 1906, which is accepted as governing all forms of insurance on this point, and states that 'every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium or determining whether he will take the risk'.[34] In the absence of inquiry the insured need not disclose (1) any circumstance which diminishes the risk; (2) any circumstance which is known or presumed to be known to the insurer, *e.g.*, matters of common notoriety or knowledge, and matters which an insurer in the ordinary course of his business, as such, ought to know; (3) any circumstance as to which information is waived by the insurer; and (4) any circumstance which it is superfluous to disclose by reason of any express or implied warranty.[35] Whether any particular circumstance, which is not disclosed, be material or not is, in each case, a question of fact.[36]

It does not matter whether or not the insured is asked questions about it, he must disclose every material fact. This is the law which is acted on in marine insurance, but in non-marine

[33] (1928) 32 Ll.L.Rep. 98 at 102.
[34] Section 18 (2). See also Road Traffic Act, 1934, s. 10 (5).
[35] Marine Insurance Act, 1906, s. 18 (3).
[36] *Ibid.*, s. 18 (4). See, *e.g.*, *Horne* v. *Poland* [1922] 2 K.B. 364; *Schoolman* v. *Hall* [1951] 1 Lloyd's Rep. 139. See further E. R. Hardy Ivamy, 'Insurance and the "Moral Hazard"' (1954) 104 *Law Journal*, p. 755.

insurance the company has a right to ask a series of questions itself. This is done by means of a proposal form which the insured submits to the company, giving particulars of the risks against which he wishes to insure. This proposal constitutes an offer which can be accepted by the company by the issue of a policy.

By putting various questions in the proposal form, an insurance company indicates that it regards the answers as material, and indeed it is a heavy presumption to be rebutted by those who seek to establish that the question and answer are in fact immaterial.[37] A fair and reasonable construction must be applied to the answer given, and if on such construction the answer is not true, although upon extreme literalism it may be correct, then the contract is avoided.[38]

The present law is that the assured is always bound not only to make a true answer to the questions put to him, but spontaneously to disclose any fact exclusively within his knowledge which it is material for the insurer to know.[39] In *Bond* v. *Commercial Union Assurance Co.*,[40] the insured had truthfully answered a question in a proposal form in a policy enabling any competent driver to drive his car, and he did not know that any further information was required. It was held that his failure to disclose that his son, who was a bad risk and who was likely to drive the car, was a material non-disclosure, even though he had not his son in mind at the time he completed the proposal form.

The company runs a risk in asking questions, in that it may be said 'Well there is a material fact which you did not ask a question about, and as you did not ask a question about it you cannot say that it was material and ought to have been disclosed'.[41] Thus in *Brewtnall* v. *Cornhill Insurance Co., Ltd.*,[42] the proposer was asked the question in relation to a motor car: 'What is the cost price to the proposer?' She answered:

[37] *Dawsons Ltd.* v. *Bonnin* 1921 S.C. 511 at 518 (*per* Lord Dundas). See also *Anderson* v. *Fitzgerald* (1853) 4 H.L.C. 484; *London Assurance* v. *Mansel* (1879) 11 Ch.D. 363.

[38] *Condogniannis* v. *Guardian Assurance Co., Ltd.* [1921] 2 A.C. 125.

[39] *Wheelton* v. *Hardisty* (1857) 8 E. & B. 232 at 270 (*per* Campbell, C.J.).

[40] (1930) 35 Com.Cas. 171.

[41] *McCormick* v. *National Motor & Accident Insurance Union Ltd.* (1934) 40 Com.Cas. 76 at 78 (*per* Scrutton, L.J.). See also *Newsholme Bros.* v. *Road Transport & General Insurance Co., Ltd.* [1929] 2 K.B. 356 at 363 (*per* Scrutton, L.J.).

[42] (1930) 40 Ll.L.Rep. 166.

'£145', but did not disclose that part of this price was made up by the part exchange of another car. It was held that this was not the non-disclosure of a material fact. Charles, J., said that if the insurance company really wished, in asking the question as to the cost price to the proposer, to have all the ingredients of the costs set out in the proposal form, they should have framed their question in such a way as would show to the proposer what it was that was expected of her.

To enable an insured to determine clearly which facts are material for the insurer to know, one solution which may be put forward is that new legislation should provide that, in the absence of fraud, no disclosure need be made of any matters except those as to which information is required by the questions appearing in the proposal form.

But it would appear that insurance companies are not content with the protection that they get against fraudulent misstatements or non-disclosure of material facts. They often require in their proposal forms that the insured should warrant that the accuracy as well as the bona fides of his answers to various questions put to him by them or on their behalf should be a condition of the validity of the policy. If the statements are inaccurate, they can avoid the policy, even if they are not material to the assumption of the risk.

As Fletcher Moulton, L.J., pointed out in *Joel* v. *Law Union & Crown Insurance Co.*[43] (a case concerning a life policy), this procedure might be reasonable in some matters, such as the age and parentage of the applicant, or information as to his family history which he must know as facts. It might be justifiable to stipulate that these conditions should obtain for a reasonable time during which the company might verify the accuracy of the statements which by hypothesis had been made bona fide by the applicant. Insurance companies, however, had made the correctness of statements of matters wholly beyond his knowledge conditions of the validity of the policy. If the company chose to dispute the policy and established a single inaccuracy in the statements made, the policy would be void, and usually all that had been paid thereon was forfeit. Similarly in *Anderson* v. *Fitzgerald*,[44] Lord St. Leonards said that unless this matter were

[43] [1908] 2 K.B. 863 at 885.
[44] (1853) 4 H.L.C. 484 at 507. See also *Macdonald* v. *Law Union Insurance Co.* (1874) L.R. 9 Q.B. 328.

explained to proposers, it would lead a vast number of persons to suppose that they had made provision for their dependents by an insurance on their lives, when from the very commencement the policy was not worth the paper upon which it was written.

This method of turning representations in proposal forms into warranties started with life insurance, but modern practice tends towards the use of a form of proposal where the proposer is asked to give replies to the best of his knowledge and belief,[45] and courts tend to construe the answers given as stating nothing more than the belief of the assured.[46] Nevertheless, a proposal in the form criticised above is still possible, and has spread to other forms of insurance, *e.g.*, motor and accident.

Another method of turning the representation of the proposer into a warranty is to provide in the policy itself that if anything stated in his answers is untrue, the policy is to be void.[47] As an alternative the policy can state that the proposal is to be the 'basis of the contract'. This was the term used in the leading case of *Dawsons Ltd.* v. *Bonnin*.[48] Here the proposer who wished to insure a lorry against damage by fire had inadvertently given an inaccurate answer as to the place at which it was to be garaged. It was held by the House of Lords that although the misstatement in the proposal form was not material, the insurer was not liable because the truth of the statements had been made a condition of the policy, and this had been broken. Similarly in *Paxman* v. *Union Assurance Society Ltd.*,[49] the company was held entitled to avoid a policy, when the date of purchase and price paid for a lorry had been wrongly stated by the insured, for whether these in the circumstances were material or not did not have to be considered. In *Mackay* v. *London General Insurance Co., Ltd.*,[50] in answer to the question in a proposal form for a

[45] See Houseman, *The Law of Life Assurance* (4th ed., 1954), p. 22.
[46] *Fowkes* v. *Manchester & London Life Assurance & Loan Association* (1863) 3 B. & S. 917; *Delahaye* v. *British Empire Mutual Life Assurance Co.* (1897) 13 T.L.R. 245.
[47] *Thomson* v. *Weems* (1884) 9 App.Cas. 671.
[48] [1922] 2 A.C. 413.
[49] (1923) 15 Ll.L.Rep. 206.
[50] (1935) 51 Ll.L.Rep. 201. Other cases are *Glicksman* v. *Lancashire & General Insurance Co., Ltd.* [1927] A.C. 139; *Newsholme Brothers* v. *Road Transport & General Insurance Co., Ltd.* [1929] 2 K.B. 356; *Jester-Barnes* v. *Licenses & General Insurance Co., Ltd.* (1934) 49 Ll.L.Rep. 231. See also *West* v. *National Motor & Accident Insurance Union Ltd.* [1954] 2 Lloyd's Rep. 461 and E. R. Hardy Ivamy, 'The Effect of Under-Insurance' (1955) 22 *The Solicitor*, p. 91.

motor car policy the insured had said that he had never been convicted. Some years before he had been fined 10s. for riding a motor bicycle with defective brakes. Swift, J., held that the answer though inaccurate was immaterial, but since the insured had warranted the truth of his statements he could not recover under the policy.

With regard to motor insurance a 'basis clause' or its variations has lost some of its importance because insurance companies cannot rely on them in respect of claims by third parties.[51]

To avoid the 'hardship'[52] that may be caused by a 'basis clause' one possible revision that might be made is legislation to the effect that the contract of insurance is not to be invalidated by an erroneous statement in an answer in a proposal form unless it is material. A precedent for this is to be found in the Insurance Statute of Ontario[53] and also in our own Industrial Assurance and Friendly Societies Act, 1948.[54]

The Marine Insurance Act, 1906, provides that an express warranty must be included in the policy or incorporated by reference to it,[55] but this rule does not apply in non-marine policies. The proposal form may contain a 'basis clause' and no mention of this need be made in the policy itself.[56] Similarly no mention need be made of an oral condition under which the policy is to operate.[57] If no mention of the proposal form is made in the policy, the assured may be under a disadvantage if he has no copy of it, where warranties made in it refer to the future. The policy can elevate the answers of the assured into warranties even though they are not so according to the terms of the proposal form.[58]

Even if the policy incorporates the proposal form, the assured may find it difficult to fit the disjointed parts together in

[51] Road Traffic Act, 1934, s. 10 (3).

[52] See the speech of Lord Buckmaster in *Provincial Insurance Co., Ltd.* v. *Morgan* [1933] A.C. 240 at 247: 'I wish again to repeat that it is perfectly open to people to make such a bargain, and when made, it is useless to complain that the bargain is harsh'.

[53] Revised Statutes of Ontario, 1950, c. 183, s. 89 (5) (6) (7). See also, Revised Statutes of Saskatchewan, 1953, c. 133, s. 135 (5) (6) (7).

[54] Section 9.

[55] Section 35 (2).

[56] *Locker & Woolf Ltd.* v. *Western Australian Insurance Co., Ltd.* [1936] 1 K.B. 408.

[57] *Anglo Californian Bank Ltd.* v. *London & Provincial Marine & General Insurance Co., Ltd.* (1904) 10 Com.Cas. 1.

[58] *Dawsons Ltd.* v. *Bonnin* [1922] 2 A.C. 413.

such a way as to get a true and complete conspectus of what his rights and duties are, and what acts on his part may involve a forfeiture of the insurance.[59]

To meet these criticisms new legislation could provide that the policy should set out all its terms and conditions in full, and that the proposal form should not be considered part of the policy except in so far as the Court considered that it contained a material representation by which the insurer was induced to enter into the contract.[60]

### REPUDIATION OF LIABILITY ON THE GROUND OF BREACH OF CONDITION

Finally, it remains to be considered whether insurers, irrespective of the 'accuracy of the proposal' and 'basis' clauses, should be entitled to repudiate liability by reason of a breach of condition.

Whether a stipulation in a policy is to be regarded as a 'warranty' giving rise to an action for damages on breach, or as a 'condition' entitling the company to repudiate liability, is a matter of little practical importance. For it is the general practice of insurance companies to insert a 'condition precedent' clause which provides that 'the due observance and fulfilment of the terms, provisions, conditions and endorsements of this policy in so far as they relate to anything to be done or complied with by the assured shall be conditions precedent to any liability of the company to make any payment under the policy'. If there has been a breach of any clause, however unimportant, which is made a condition of the policy, the company will be under no liability. For instance, suppose a motorist is involved in two different accidents and has broken a condition of the policy in that he has failed to inform the company of a third-party claim arising out of the first accident. This failure will debar him from recovering anything in respect of the second or any other accident.

Further, the company will not be liable, even if the breach of the condition did not cause the loss. Two examples of this will suffice.

[59] *Provincial Insurance Co., Ltd.* v. *Morgan* [1933] A.C. 240 at 252 (*per* Lord Wright).

[60] This method has already been adopted in Canada. See Revised Statutes of Ontario, 1950, c. 183, s. 89 (1) (4), and Revised Statutes of Saskatchewan, 1953, c. 133, s. 135 (4).

In *Jones & James* v. *Provincial Insurance Co., Ltd.*,[61] a motor car insurance policy contained a clause that the insured should take all reasonable steps to maintain such vehicle in efficient condition, and the observation of this condition should be a condition precedent to the liability of the company. The insured had removed the handbrake from the car and left only a foot-brake. The vehicle was involved in an accident, and when a claim was made under the policy, it was held that it could not succeed, because the condition had been broken, even though the exact cause of the accident could not be ascertained. Similarly in *Brown* v. *Zurich General Accident & Liability Insurance Co., Ltd.*,[62] the insured was to 'take all reasonable steps to safeguard from loss or damage and maintain in efficient condition' the van in question. He had allowed parts of both tyres on the front wheels to become completely devoid of any trace of tread, though not worn down to the canvas at any point. The van skidded on an icy surface, though this might have occurred even if the front tyres had had adequate treads, since on ice no tyres provide sufficient adhesion. It was held that the insured could not recover under the policy because he had broken the condition.

The insured is protected to a certain extent by the general rule of construction that if the insurance company wish a clause to be a condition precedent, they must say so quite clearly,[63] for the avoidance of the policy may inflict loss and injury to the assured and those claiming under him out of all proportion to any damage that could possibly accrue to the company from non-observance or non-performance of the clause.[64] For instance, in *Stoneham* v. *Ocean, Railway, & General Accident Insurance Co.*,[65] a condition that 'in case of a fatal accident notice must be given to the company within seven days' was held not to be a condition precedent, but only a collateral promise enabling the company to claim the extra expenses which they would incur if

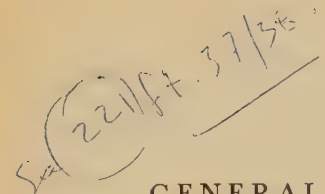
[61] (1929) 46 T.L.R. 71.
[62] [1954] 2 Lloyd's Rep. 243. For a consideration of these two cases see an article by E. R. Hardy Ivamy, 'An Insurer's Liability for Unroadworthy Vehicles' (1955) 99 *Solicitors' Journal*, p. 19.
[63] *Jones & James* v. *Provincial Insurance Co., Ltd.* (1929) 46 T.L.R. 71 at 73 (*per* Rowlatt, J.).
[64] *Re Bradley and Essex & Suffolk Accident Indemnity Society* [1912] 1 K.B. 415 at 430 (*per* Farwell, L.J.).
[65] (1887) 19 Q.B.D. 237.

they had to investigate the circumstances of accidents at long intervals after their occurrence.[66]

It might be possible to provide by new legislation that insurance companies should set out in their policies 'essential' stipulations, which should have the force of conditions enabling the company to repudiate liability if they were broken, and 'non-essential' conditions, breach of which would give a right to an action or counter-claim for damages, and forbid the conversion of 'non-essential' into 'essential' stipulations by means of the 'condition precedent' clause. Difficulties, however, might well be experienced in classifying 'essential' and 'non-essential' stipulations. Perhaps the solution would be the provision of 'statutory conditions' which alone could be inserted in policies,[67] breach of any of which would entitle the company to repudiate. A more drastic step would be to enact that repudiation would be allowed only if the breach of condition were conducive to the loss incurred, *e.g.*, the unroadworthy state of a vehicle being the cause of an accident.

[66] See also *Re Bradley and Essex & Suffolk Accident Indemnity Society* (*supra*); *Re Coleman's Depositories and Life & Health Assurance Association* [1907] 2 K.B. 798; *Cawley* v. *National Employers' Accident & General Assurance Association Ltd.* (1885) Cab. & El. 597; *Welch* v. *Royal Exchange Assurance* [1939] 1 K.B. 294, C.A.; *Employers' Liability Assurance Corporation* v. *Taylor* (1893) 29 Can.Sup.Ct. 104.

[67] *Supra*, at pp. 150–151.



# 10

# GENERAL PRINCIPLES OF LAW AND HUMAN RIGHTS

L. C. Green

In his *De Jure Belli ac Pacis* Grotius declares 'that Kings, and those who are invested with a Power equal to that of Kings, have a Right to exact Punishments, not only for Injuries committed against themselves, or their Subjects, but likewise, for those which do not particularly concern them, but which are, in any Persons whatsoever, grievous Violations of the Law of Nature or Nations. For the Liberty of consulting the Benefit of human Society, by Punishments, . . . [means] that War is lawful against those who offend against Nature'.[1] He goes on to warn, however, that 'here some Precautions are to be observed; the first of which is, that Civil Customs, tho' received among many Nations, not without good Reason, be not mistaken for the Law of Nature. . . . The second is, that among Things forbidden by Nature, we do not inconsiderately reckon those, of which we have not sufficient Evidence that they are such, but that are rather repugnant to some positive Law of God'.[2]

This comment of Grotius, which refers to the right of protecting all men regardless of nationality or of residence, is far wider than the concept of the minimum standards of international law, which 'approximate to the minimum requirements of the rule of law in the Anglo-American sense of the term'.[3] The doctrine of State sovereignty, however, implies that, with the exception of any duty arising from treaty obligations, there is, prima facie, the right to treat one's own nationals as one pleases. This is a matter of domestic jurisdiction, a principle which reaches its climax in Article 2, paragraph 7, of the Charter of the United Nations and in the reservations to their declarations made under the 'Optional Clause' of the Statute of the World Court by

[1] Bk. 2, ch. 20, s. 40, 1 and 4, English translation, 1738, pp. 436–437, 438.
[2] Bk. 2, ch. 20, ss. 41, 42, *loc. cit.*, p. 439.
[3] G. Schwarzenberger, *International Law*, 1949, Vol. 1, p. 99.

France, Mexico, Pakistan and the United States.[4] But, as Judge Huber pointed out in the *Island of Palmas* Arbitration,[5] 'this right [sovereignty] has as corollary a duty: the obligation to protect within the territory the rights of other States. . . . together with the rights which each State may claim for its nationals in foreign territory'. Inherent in sovereignty there is the right to treat one's own nationals as one pleases and the obligation to treat aliens within one's territory in accordance with at least the minimum standards of international law,[6] which today reflect such general principles of law recognised by civilised nations—or perhaps more correctly such principles of law as are generally recognised by civilised nations—as have become embodied in Western concepts of the rule of law.

In the past there was a religious basis, often framed in the form of natural law, for such claims. Thus, in his *De Indis Novis Inventis,* 1532, Vitoria, calling in aid 'the law of nations which either is natural law or derived from natural law', maintained that the Spaniards had the right to reside in the Indies 'provided they do no harm to the natives, and the natives may not prevent them'. This right was claimed, however, not merely against non-Catholic aborigines, for 'it would not be lawful for the French to prevent the Spanish from travelling or even from living in France, or vice versa, provided this in no way enured to their hurt and the visitors did no injury.' He also postulated the inalienable right of the Spaniards to carry on trade with the Indians, and 'if the Spaniards kept off the French from trade with the Spaniards, and this not for the good of Spain, but in order to prevent the French from sharing in some advantage, that practice would offend against righteousness and charity'. Righteousness and charity are religious concepts and if the Indians offended against them by denying such rights to the Spaniards they would have committed a wrong authorising the Spaniards to resort to a just war against them.[7] What is

[4] International Court of Justice, *Year Book 1952–1953,* pp. 173, 177, 178, 182, resp.

[5] (1928) 2 *United Nations Reports of International Arbitral Awards,* 1949, p. 829, at p. 839.

[6] Cf. A. H. Roth, *The Minimum Standards of International Law Applied to Aliens,* 1949.

[7] Section 3, paras. 386–393, cf. J. B. Scott, *The Spanish Origin of International Law,* Part 1, *Francisco de Vitoria and his Law of Nations,* 1934, pp.xxxvi–xxxix.

significant in Vitoria's view of natural law, however, is not only his assertion of the right of peaceful penetration, but his recognition of the Indians as being within the international system even though they were 'barbarians'. The rights which belonged to Spaniards also belonged to Indians, and he conceded that even they could reply to the Spanish just war by themselves waging a just war, 'seeing that on one side there is right and on the other side there is invincible ignorance'.[8] Apart from any title that the Spaniards might have had to enjoy such rights on the basis of natural law, Vitoria did not fail to point out that 'another possible title is by way of propagation of Christianity, [for] Christians have a right to preach and declare the Gospel in barbarian lands'.[9]

### TREATY PROTECTION OF HUMAN RIGHTS

The religious nature of claims to protect one's own nationals at times spread into the field of protection of aliens. Although international law prescribed that foreign States could only intervene to secure fair treatment for their own nationals, there have been treaties concluded at various times embodying principles guaranteeing the observance of some of the rights of man, and in particular the right of religious toleration. Thus, although the Treaty of Augsburg, 1555,[10] was directed to ensuring the equality of Catholic and Protestant Princes and postulated the principle *cujus regio, ejus religio,* it provided that in the Free Cities of the Holy Roman Empire where either Protestants or Catholics were often in only a small majority the two confessions were to live 'quietly and peacefully together'.[11] Within one hundred years this principle was so well recognised that by the Treaty of Westphalia, 1648,[12] '" subjects who in 1627 had been debarred from the exercise of their religion, other than that of their ruler, were . . . granted the right of conducting private worship, and of educating their children, at home or abroad, in conformity with their own faith; they were not to suffer in any civil capacity nor to be denied religious burial, but were to be at liberty to emigrate,

[8] Section 3, para. 394, p. xl.
[9] *Ibid.*, para. 396, p. xli.
[10] J. de Dumont, *Corps Universel Diplomatique du Droit des Gens,* 1726, Vol. 4, Part 3, pp. 88–93.
[11] G. Schwarzenberger, *Power Politics,* 1951, p. 614.
[12] Dumont, *op. cit.,* note 10 above, 1728, Vol. 6, Part 1, pp. 468–490.

selling their estates or leaving them to be managed by others". . . . The principle of religious equality was placed as part of the peace under an international guarantee'.[13]

With the expansion of the known world and the development of economic and political rationalism, a situation developed which, in the nineteenth century especially, was generally favourable to the protection of human rights.[14] This is perhaps most manifest in the series of treaties between Vienna, 1815,[15] and Brussels, 1890,[16] dealing with slavery and the slave trade. In the *Le Louis,* 1817,[17] Sir William Scott pointed out that the 1815 Treaty was both declaratory of fact and promisory of future measures: 'the contracting parties mutually inform each other of the fact that they *have* in their respective dominions abolished the slave trade, without stating at all the mode in which the abolition has taken place. It next engages to take future measures for the universal abolition. That with regard to both the declaratory and promisory parts Great Britain has acted with the *optima fides* is known to the whole world, which has witnessed its domestic laws as well as its foreign negotiations'. Although France was a party to the Treaty and the British Government acted with 'perfect propriety in accepting the assurance that the French Government had actually abolished the slave trade, as a sufficient proof of the fact', Sir William accepted as final the statement that the slave trade had not yet been made illegal by French legislation. By 1822 the slave trade had been rejected by the United States and the whole of Europe with the exception of France and Portugal, and in *U.S.* v. *La Jeune Eugénie,*[18] Story, J., was called upon to consider the compatibility of slavery and the slave trade with the natural rights of man. He admitted that 'under some circumstances slavery may have a lawful existence, and the practice may be justified by the conditions,

[13] L. Gross, 'The Peace of Westphalia, 1648–1948' (1948) 42 *American Journal of International Law,* p. 20, at p. 22, citing Sir A. W. Ward, 'The Peace of Westphalia' (1934) 4 *Cambridge Modern History,* p. 412.

[14] Cf. C. de Visscher, *Théories et Réalités en Droit International,* 1953, p. 211.

[15] Declaration of the Eight Powers, relative to the Universal Abolition of the Slave Trade (Sir E. Hertslet, *The Map of Europe by Treaty,* 1875, Vol. 1, No. 7).

[16] General Act relative to the African Slave Trade (82 *British and Foreign State Papers,* p. 55).

[17] 2 Dods. 210 at 260–261.

[18] (1822) 2 Mason Reports 409 at 445–446.

or wants, of society, . . . [but the traffic] necessarily carries with it a breach of all the moral duties, of all the norms of justice, mercy and humanity, and of the admitted rights, which independent Christian nations now hold sacred in their intercourse with each other'. A similar point was made by the Umpire in *The Enterprise* (1855). He pointed out that although not contrary to international law, slavery was 'contrary to the principles of justice and humanity'.[19]

By the twentieth century this type of treaty developed still further and eventually gave birth to the minorities régime of the League of Nations era,[20] based on the assumption of true equality between nationals and minority groups alike.[21] Since the Second World War there seems to have been a retreat from the practice of protecting national minorities and minorities treaties are now practically unknown. It is only in such circumstances as arose from the division of India into India and Pakistan with large minorities in each, that minority rights have been protected by treaty.[22] When, however, the United Nations has been responsible for creating a situation in which minority problems may arise, attempts have been made to ensure protection. This has been done by conferring legal force upon the Universal Declaration of Human Rights, as was the case with Libya [23] and Italian Somaliland.[24]

As a result of 'the instability of international relations' [25] produced by the ideological cold war, the type of minority that requires protection today is political rather than religious and ethnic, a situation that was recognised by the Court of Queen's Bench when it redefined the concept of 'political offender' in

[19] 4 J. B. Moore, *International Arbitrations,* p. 4394.
[20] See, for example, J. Robinson and Others, *Were the Minorities Treaties a Failure?* 1943.
[21] Cf. Advisory Opinions of Permanent Court of International Justice on *German Settlers in Poland,* 1923, Series B, No. 6, p. 24, and *Minority Schools in Albania,* 1935, Series A/B, No. 64, pp. 19–20.
[22] Indo-Pakistan Minorities Agreement, 1950 (1953) 2 *Indian Year Book of International Affairs,* p. 302. Cf. also Special Statute on Trieste, 1954, Cmd. 9288, Annex 2.
[23] Resolution of the Committee of 21, 1950, United Nations (1953) *Year Book on Human Rights for 1951,* p. 225. Cf. also Report of United Nations Commissioner to General Assembly (1951) *Year Book of the United Nations,* p. 269.
[24] Annex to trust agreement, Declaration of Constitutional Principles, Art. 10 (1950) *Year Book of the United Nations,* p. 806.
[25] De Visscher, *op. cit.,* note 14 above, p. 213.

connection with extradition treaties.[26] This change of emphasis was already fully recognised in the Peace Treaties between the United Nations and the Axis satellites.[27] Each defeated State expressly undertook to 'take all measures necessary to secure to all persons under [its] jurisdiction, without distinction as to race, sex, language or religion, the enjoyment of human rights and the fundamental freedoms, including freedom of expression, of press and publication, of religious worship, of political opinion and public meeting'.[28] When a dispute arose as to the observance of these obligations, it was not the matter of substance but a question concerning the machinery for interpreting the Treaties that was referred to the World Court. The Court considered[29] that the Treaties could not be interpreted without the co-operation of the parties alleged to have broken them, allegations which were of course denied.

### HUMANITARIAN INTERVENTION

Even in the absence of treaties some States have claimed the right to intervene in the affairs of other States. This type of intervention had already been approved by Vitoria, at least when undertaken on religious grounds. He considered that 'if any of the native converts to Christianity be subjected to force or fear by their princes in order to make them return to idolatry, this would justify the Spaniards . . . in making war and in compelling the barbarians by force to stop such misconduct, . . . and in deposing rulers as in other just wars. . . . Suppose a large part of the Indians were converted to Christianity, and this whether it were done lawfully or unlawfully, . . . so long as they really were Christians, the Pope might for a reasonable cause, either with or without a request from them, give them a Christian sovereign and depose their other unbelieving rulers'.[30]

In these words of Vitoria is to be found the ideological basis for many of the interventions conducted by some Powers into the affairs of others. Thus it has been said that 'to save the faith of England we made demonstrations in the Netherlands, and,

[26] *Re Kolczynski* [1955] 1 All E.R. 31. Cf. also the writer's 'Recent Practice in the Law of Extradition' (1953) 6 *Current Legal Problems*, p. 274, at pp. 281–289.
[27] Cmds. 7483, 7485, 7486 (1948).
[28] Bulgaria, Art. 3; Hungary, Art. 2; Roumania, Art. 3.
[29] *Interpretation of Peace Treaties, I.C.J. Reports 1950*, pp. 65, 221.
[30] *Op. cit.*, note 7 above, para. 401, p. xliii.

when it appeared that the Catholic League, or the Austrian Hapsburgs, would carry all before them in Germany, it seemed to Protestants that, in answer to their petitions, the Lord God aroused himself and brought down the Danish and the Swedish armies from the north. By faith, or rather for the faith, Oliver Cromwell made his effort on behalf of the Duke of Savoy's Vaudois. . . . [Similarly] although religious intervention practically ceased in Western Europe after the Treaty of Westphalia, in Eastern Europe where the writ of Westphalia never ran and religion remained a more important criterion than State allegiance, it was destined to endure as a very real factor. The Tsaritsa Catherine's first intervention in Poland was, ostensibly at least, produced by concern for those Polish subjects who were Orthodox in faith. Her Turkish policy was largely affected by her claim to exercise a guardianship over the Greek Orthodox subjects of the Sultan'.[31]

The attitude adopted by England and Russia in these cases may well have been an ideological cover for political ends, but this was certainly not always so. In 1844 Lord Aberdeen condemned the Porte for its 'barbarous practice' of executing Mahomedan subjects who had adopted Christianity. He referred to the British practice in India and, in words reminiscent of Vitoria, maintained that for the British Government, 'as a Christian Government, the protection of those who profess a common belief with themselves, from persecution and oppression, on that account alone, by their Mahomedan rulers, is a paramount duty with them, and one from which they cannot recede'.[32]

It was not only on behalf of Christians with whom they shared common belief, nor solely against non-Christian States, that the Western Christian States were prepared to intervene. In 1840 the United States Secretary of State sent a despatch to the American Consul at Alexandria in connection with atrocities committed against the Jews of Damascus: 'The President has witnessed, with the most lively satisfaction, the effort of several of the Christian Governments of Europe, to suppress or mitigate these horrors, and he has learned with no common gratification,

[31] Sir Geoffrey Butler and S. Maccoby, *The Development of International Law*, 1928, p. 69.

[32] 32 *British and Foreign State Papers*, pp. 915–916. Cf. G. Schwarzenberger, 'The Protection of Human Rights in British State Practice' (1948) 1 *Current Legal Problems*, p. 152, at p. 156.

their partial success. He is, moreover, anxious that the active sympathy and generous interposition of the Government of the United States should not be withheld from so benevolent an object, and he has accordingly directed me to instruct you to employ, should the occasion arise, all those good offices and efforts which are compatible with discretion and your official character, to the end that justice and humanity may be extended to these persecuted people'.[33] Again, in 1872, a Consul's Note was delivered in Bucharest by the consuls of Germany, Austria Hungary, France, Great Britain, Greece, Italy and the United States, who 'deem it their duty to address to the government of the Prince, collectively, and in the most formal manner, the verbal observations which most of them have been ordered by their governments to present to it in relation to the Israelitish question. . . . The governments of the undersigned will judge whether the impunity which has been enjoyed by the assailants of the Jews is not of a nature to encourage a repetition of scenes of violence quite unworthy of a civilised country, which, as such, ought to ensure freedom and security to all religious denominations'.[34]

These documents indicate that intervention on behalf of those persecuted for religious belief was frequently motivated not merely by narrow concepts of religious sympathy, but by a secularisation of the fundamentals of religious belief. It reflects what may be described as a community of spirit in the countries of the Western world, based on a common belief in the worth and dignity of man and of his right to enjoy his life free from persecution and in the same freedom as those among whom he lives. In these messages there is an assertion of a right to intervene, at least by way of protest, when the treatment of nationals fell below those minimum standards which might be described as general principles of conduct recognised by civilised Christian nations, and which within those nations frequently amounted to broad principles of law.

It was not only in the field of religion that intervention took place, and in the nineteenth century there grew up the concept of humanitarian intervention. This is perhaps not surprising in

[33] Forsyth to Gliddon, August 14, 1840, cf. C. Adler and A. M. Margalith, *With Firmness in the Right*, 1946, p. 4.
[34] April 18, 1872, *ibid.*, p. 106.

view of the fact that Christian States expected State conduct to conform to the basic principles of Christian civilisation, although it was often recognised that the legal ground for such intervention was tenuous to say the least. In 1827 Great Britain, France and Russia intervened in the Greco-Turkish troubles to stop Turkish atrocities. In 1848 Britain suggested Franco-British mediation in the Civil War in the Two Sicilies to end the cruelties of that war, while British representatives were encouraged to maintain contacts with revolutionary forces and remind them of the rules of warfare in civilised countries, and there were frequent occasions when British embassies afforded 'shelter to men marked down by their political opponents. Justification for these acts is not primarily to be sought on narrow legal grounds but on the grounds of common humanity and decency and in a healthy British reaction to the departure by others from such standards'.[35]

Similarly, in 1867 the United States Secretary of State communicated with the American Minister in Mexico about atrocities committed by the Republican armies, for 'such severities would be injurious to the national cause of Mexico and to the Republican system throughout the world. You will communicate to President Juarez promptly, and by effectual means, the desire of this Government, that in case of capture the prince [Maximilian] and his supporters may receive the humane treatment accorded by civilised nations to prisoners of war'.[36] That the United States was aware of the possible weakness of its legal right to intervene in such circumstances was made clear when Russian pogroms resulted in an influx of Russian Jews into the United States: 'The Government of the United States does not assume to dictate the internal policy of other nations, or to make suggestions as to what their municipal laws should be or as to the manner in which they should be administered. Nevertheless, the mutual duties of nations require that each should use its power with a due regard for the other and for the results which its exercise produces on the rest of the world. It is in this respect that the condition of the Jews in Russia is now brought to the attention of the United States, upon whose shores are cast daily evidences of the suffering and destitution wrought by the enforce-

[35] *Loc. cit.*, note 32 above, pp. 165–166. Cf. also *op. cit.*, note 31 above, pp. 69–73.

[36] Seward to Campbell, April 6, 1867, 1 F. Wharton, *International Law Digest*, 1886, p. 238.

ment of the edicts against this unhappy people. I am persuaded that His Imperial Majesty the Emperor of Russia and his councillors can feel no sympathy with measures which are forced upon other nations by such deplorable consequences. (You will read this instruction to the minister of foreign affairs)'.[37]

The record of the nineteenth century shows that humanitarian intervention as a policy was only of value when resorted to by a stronger Power against a weaker one. Sir William Harcourt's comments on the British intervention in Greece indicate the political character of such acts: 'it was the natural and almost inevitable consequence of a forcible intervention to prevent the Turkish Government from reducing its subjects to submission. The emancipation of Greece, effected by Eúrope, was a high act of policy above and beyond the domain of law. As an act of policy, it may have been, and probably was, justifiable; but it was not the less a hostile act, which, had she dared, Turkey might properly have resented by war. . . . Intervention is a question rather of policy than of law. It is above and beyond the domain of law, and when wisely and equitably handled by those who have the power to give effect to it, may be the highest policy of justice and humanity'.[38] A similar view of intervention, although in an entirely different context, was taken by the World Court in the *Corfu Channel Case*: 'The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organisation, find a place in international law. . . . From the nature of things, it would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself'.[39]

Before the nineteenth century intervention was based on Christian beliefs and the religious concept of the worth of man; by the time of the French Revolution, however, new libertarian political teachings were current and inherent in them was the concept of the equality of man as a fundamental right. The teachings, however, were rationalist rather than religious, and the interventions of the period may to a great extent have been

[37] Blaine to Smith, February 18, 1891, *op. cit.*, note 33 above, pp. 220–221.
[38] *Historicus on International Law*, 1863, pp. 6, 14.
[39] *I.C.J. Reports 1949*, p. 4, at p. 35.

motivated by the declarations of rights embodied in the constitutions of the democratic intervening States. Thus, it has been suggested that 'in the nineteenth and twentieth centuries the recognition of the fundamental rights of man in the constitutions of States has become, in a paraphrase of Article 38 of the Statute of the Permanent Court of International Justice, a general principle of the constitutional law of civilised States'.[40] Since, however, constitutions are not irrevocable, 'the rights of man cannot, in the long run, be effectively secured except by the twin operation of the latent forces of the law of nature and of the compelling force of the law of nations'.[41] Unfortunately, however, the concept of natural law, particularly in this connection, is often relegated to purely ideological purposes. This prospect was clearly seen by the United States–Mexican Claims Commission in the *North American Dredging Company Claim*: 'The law of nature may have been helpful, some three centuries ago, to build up a new law of nations, and the conception of inalienable rights of men and nations may have exercised a salutary influence, some one hundred and fifty years ago, on the development of modern democracy on both sides of the ocean; but they have failed as a durable foundation of either municipal or international law and cannot be used in the present day as substitutes for positive municipal law, on the one hand, and for positive international law, as recognised by nations and governments through their acts and statements, on the other hand. Inalienable rights have been the cornerstones of policies like those of the Holy Alliance and of Lord Palmerston; instead of bringing the world the benefit of mutual understanding, they are to weak or less fortunate nations an unrestrained menace'.[42]

By the twentieth century there was evident in State practice a backsliding from the former willingness to intervene on humanitarian grounds, and even on religious grounds, and there seemed to be no desire to tie respect for human rights to either the law of nature or of nations. In 1938, the United States, which some fifty years before had been willing to intervene against religious persecution abroad, declined to intervene in the religious situation in Mexico. While expressing American policy

[40] H. Lauterpacht, *International Law and Human Rights* 1950, p. 89.
[41] *Ibid.*, p. 93.
[42] (1926) 4 *United Nations Reports of International Arbitral Awards*, 1951, p. 26, at pp. 29–30.

as being directed to 'the actual grant of religious liberty in every country of the world, . . . it should be borne in mind that . . . it is not appropriate or proper that we should seek to determine or influence the circumstances of domestic problems in a foreign country by taking any official action with relation thereto, however peaceable, friendly or well-intentioned. . . . There are certain limits binding every government in its proper relations to other governments, to exceed which would defeat the very purposes sought. . . . Within these limits the President has championed, and will continue to champion, the principles of the freedom of worship and education for all nationals in every country of the world'.[43] A similar unwillingness to intervene was shown by the Powers in relation to Hitler's excesses in Germany. This led Professor H. A. Smith to declare that 'in practice we no longer insist that States shall conform to any common standards of justice, religious toleration and internal government. Whatever atrocities may be committed in foreign countries, we now say that they are no concern of ours. Conduct which in the nineteenth century would have placed a government outside the pale of civilised society is now deemed to be no obstacle to diplomatic friendship. This means, in effect, that we have now abandoned the old distinction between civilised and uncivilised States'.[44]

### HUMAN RIGHTS AS AN IDEOLOGY

Despite their unwillingness to intervene on behalf of foreigners denied treatment equivalent to the minimum demanded for their own nationals abroad, States do not refrain from appealing to general principles of law or human rights on behalf of aliens for ideological reasons.[45] Too often, 'the usual vindication of freedom, democracy, and culture can be described as ideological because the discussion generally terminates in showing that freedom in itself is better than regimentation, self-determination

[43] Welles to King, April 28, 1938, 2 H. G. Hackworth, *Digest of International Law*, 1941, p. 152.

[44] 19 *The Listener*, No. 472, January 26, 1938, p. 183. Cf. also G. Schwarzenberger, 'The Standard of Civilisation in International Law' (1955) 8 *Current Legal Problems*, p. 212 *et seq.*

[45] An ideology may be defined as 'a political creed embodying ideal good or bad, the realisation of which its devotees are taught to believe is essential for the salvation of mankind,' Sir Victor Wellesley, *Diplomacy in Fetters*, 1944, p. 93.

better than dictatorship, and spontaneous culture better than censorship of self-expression. No reasonable man will deny this so long as the question arises in abstract form. . . . [But] these problems cannot be solved as long as freedom and democracy are regarded merely as ideological postulates, or abstract principles of universal application. We really begin to grapple with them only when we are in a position to analyse them sociologically. . . . The relevance of principles of political organisation can only be discovered by empirical means, that is by recognising the social processes which either allow a mechanism to function in a society or else annihilate it'.[46]

At the San Francisco Conference the partisans of human rights introduced into the Preamble of the Charter of the United Nations a reaffirmation of 'faith in fundamental human rights, in the dignity and worth of the human person, [and] in the equal rights of men and women'. In the Charter this declaration of faith is repeated,[47] but is so expressed as to amount to no more than a pledge that the United Nations shall seek to 'encourage and promote' respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion. In the Charter no attempt is made to define the content or nature of these rights, although some preliminary efforts in this direction had already been made in the Declaration by United Nations, 1942.[48] The parties declared their conviction 'that complete victory over their enemies is essential to defend life, liberty, independence and religious freedom, and to preserve human rights and justice in their own lands as well as in other lands, and that they are now engaged in a common struggle against savage and brutal forces seeking to subjugate the world'.

Some of the participants in the 1945 Conference sought to include a list of human rights in the Charter,[49] but the majority disagreed, apparently assuming that everybody knew what human rights and fundamental freedoms were. If it could be assumed that the statement in the Declaration by United Nations was what the participants had in mind, it would appear that the human rights referred to in the Charter are in fact the principles

[46] K. Mannheim, *Man and Society in an Age of Reconstruction*, 1940, p. 9.
[47] Articles 1, 13, 55, 62, 68 and 76.
[48] Cmd. 6388 (1942).
[49] UN Doc. 343, I/1/16, May 16, 1945, *UNCIO Documents*, Vol. 6, p. 296.

of law which are generally recognised by civilised nations, even though they may not amount to general principles of law recognised by civilised nations in the sense of Article 38 of the Statute of the World Court.[50] That this is probably the case is further indicated by the rights which are embodied in the Universal Declaration of Human Rights.[51] It must be remembered, however, that this Declaration is nothing more than a statement of aims and hopes which is not, and was not intended to be, binding on anybody. Nevertheless, when political necessity has demanded, members of the United Nations have not hesitated to allege that other members have disregarded the rights embodied in the Declaration. Perhaps one of the most glaring examples of this was the debate on the 'Russian Wives' in 1949, when the General Assembly condemned the Soviet Union for its breach of human rights. The Resolution obtained support from many States whose record on miscegenation and the freedom of spouses to reside where they liked left almost as much to be desired as did the Soviet practice.[52]

An attempt to define what is meant by human rights was recently made by President Eisenhower. In a Proclamation setting aside December 10, 1954, as Human Rights Day, he described the basic rights, for which 'men and women in many countries have striven and died, . . . and still others strive and die in defence of human dignity against the claims of totalitarian governments, [as] freedom of speech and of the press; freedom to worship in accord with the dictates of conscience; fair trial and freedom from arbitrary arrest; the right to own property and to profit by the fruits of our labours'.[53] In other words, he sought to generalise those standards the observation of which Western nations, reflecting their Christian traditions and their libertarian political beliefs, demand for their nationals abroad, and which they regard as inherent in any civilised system of law.

50 Cf. B. Cheng, *The General Principles of Law as applied by International Courts and Tribunals*, 1953.

51 United Nations, *These Rights and Freedoms*, 1950, p. 170.

52 Resolution No. 285 (III), May 25, 1949. Cf. the writer's 'Human Rights and the Colour Problem' (1950) 3 *Current Legal Problems*, p. 236, at pp. 245–249; J. McLaurin, *The United Nations and Power Politics*, 1951, pp. 34–40.

53 United States Information Service (London), *Daily Wireless Bulletin*, December 6, 1954.

THE GENERAL PRINCIPLES OF LAW

The general principles of law recognised by civilised nations, which have been described as 'in some ways a modern version of the law of nature',[54] constitute, by Article 38 of the Statute of the World Court, one of the sources of international law to be applied by international tribunals when necessary. It is clear from the Article that the general principles to be applied are not those of international law, for they constitute a *source* of international law and indicate one of the fields in which rules of international law are to be found. Further, the principles of law recognised by nations are, in the normal course of things, the principles embodied in the municipal laws of the nations in question. What Article 38 envisages, therefore, is the application of those basic principles of municipal law which are recognised as valid by civilised States, and it is this generality of recognition that elevates the principles from the level of municipal to that of international law. But the warning of Grotius must not be forgotten, so 'that Civil Customs, tho' received among many Nations, . . . be not mistaken for the Law of Nature', especially as 'the answer to the question: Must principles be universal to be "general"? is emphatically *No*; for any other view renders the Article unworkable. There are general principles of law—general in the sense of being applied by the principal systems of the world. But they are extremely rare[55] and must be applied with caution, for what may be a general principle found equally in civil and common law may well be subject to different interpretations in those systems'.[56]

It is not only here that differences in interpretation arise. It repays study to note how the Union of South Africa and the majority of the other members of the United Nations differ in their understanding of the words 'to encourage and promote respect for human rights and fundamental freedoms' in the Charter. Thus, the United Nations Commission on the Racial Situation in the Union of South Africa has described *apartheid* as 'injurious to human dignity and [making] the full development of personality [by the coloured races] impossible'[57] and as

[54] Lauterpacht, *op. cit.*, note 40 above, p. 115.
[55] Cf., however, Cheng, *op. cit.*, note 50 above, Appendix 2.
[56] H. C. Gutteridge, 'Meaning and Scope of Article 38' (1952) 38 *Grotius Transactions*, p. 125, at p. 127.
[57] First Report, General Assembly, Official Records: Eighth Session, Supplement No. 16 (A/2505 and A/2505 Add. 1), 1953, p. 116.

tending to 'reduce human labour to the level of beasts of burden [and] utterly revolting'.[58] Official South Africa, however, regards it as conducive to the 'building up of each race in its own area'.[59] A similar situation is to be found in the Report of the United Nations *Ad Hoc* Committee on Forced Labour which found that systems of forced labour, either as a means of political coercion or for economic purposes, existed both within and outside of the Soviet orbit. Such systems were regarded as contrary to human rights.[60] Poland accused the Union of South Africa of indulging in forced labour, but failed to put in any defence to similar allegations against herself.[61] The Committee found both allegations proved,[62] but when the Report was considered by the Governing Body of the International Labour Office the representative of South Africa maintained that his Government's policy towards Native labour was motivated solely by compelling reasons relating to economic welfare and, as such, was 'entirely reasonable and in the best interest of the people concerned'. Since the Report did not coincide with this interpretation he condemned it as discredited and disreputable.[63]

Determination of the general principles of law recognised by civilised nations requires examination of municipal systems of law and the application to international law, by analogy, of the principles common to them, but it must be remembered that there may be a danger in 'the analogous application of rules of private law to the relations of States [because of] the existence of the doctrine of State sovereignty'.[64] There can be no doubt that 'the recourse, in the domain of public international law, to private law sources . . . is fraught with danger. Some of them lie in its abuse, frequent and deliberate, for the purposes of special pleading. Whenever international tribunals have recourse to "general principles of law" they apply, as a rule, a general

58 Second Report, General Assembly, Official Records; Ninth Session, Supplement No. 16 (A/2719), 1954, p. 88.
59 *Der Transvaler*, January 18, 1955 (*The Times*, January 19, 1955).
60 *Report*, Doc. E/2431, 1953.
61 *Ibid.*, pp. 374, 306.
62 *Ibid.*, pp. 59, 80.
63 Gemmill, 'No Forced Labour in South Africa' (1954) *South Africa, United Kingdom and Commonwealth Survey*, p. 127, at p. 131. For criticisms by International Labour Office, cf. *The Times*, February 7, 1955.
64 Sir Arnold McNair, 'So-Called State Servitudes' (1925) 6 *B.Y.I.L.*, p. 111, at p. 122.

principle of private law, *i.e.*, a principle not belonging to the system of law prevalent in one country, but representing a rule of uniform application in all or in the main systems of private jurisprudence'.[65] In seeking such general principles of law, however, care must be taken to avoid falling into the trap, already warned against by Grotius, of assuming that because a particular principle of law is basic to one's own municipal system it is therefore a general principle of law which is entitled to observance by all civilised nations.[66]

When applying rules of municipal law to international law by analogy it is essential to bear in mind that the system of international law differs from that of municipal law. The social conditions which each regulates differ and the function of law likewise varies. Broadly speaking, the State, in which municipal law operates, may be described as a community,[67] while the international field in which international law functions may be described as a society.[68]

This sociological distinction between national and international society is important when examining attempts to transfer the realities of the municipal sphere to the international level. In international society, the functions of law are primarily those of the laws of power and reciprocity, rather than those of a community law of co-ordination.[69] Even when lip-service is paid to principles of co-ordination, it is more often than not power interests that are being served, with the element of co-ordination serving as an ideology. Particularly is this so in the field of human rights.

### HUMAN RIGHTS AND GENERAL PRINCIPLES OF LAW

Human rights may be classified into those which are enjoyed by the individual in isolation, such as freedom of conscience, personal freedom and private property; those which are enjoyed by the individual in conjunction with other individuals, such as

[65] H. Lauterpacht, *Private Law Sources and Analogies,* 1927, pp. 84, 69.
[66] Cf. A. V. Dicey, *The Law of the Constitution,* 1952, pp. 192–193, 194, 201–202.
[67] For a definition of 'community', cf. Advisory Opinion of the Permanent Court of International Justice on the Greco-Bulgarian 'Communities' (1930), Series B/17, p. 4, at p. 21.
[68] Cf. G. Schwarzenberger, 'The Three Types of Law' (1949) 2 *Current Legal Problems,* p. 103. Cf. also H. Lauterpacht, *The Function of Law in the International Community,* 1933, Chap. 20.
[69] Cf. Schwarzenberger, *loc. cit.*, note 68 above.

freedom of speech, discussion, writing and publication; and those which the individual enjoys as a citizen, such as equality before the law, of franchise and in access to public office. The idea of human rights, therefore, 'presents a combination of liberal and individualistic guarantees of the sphere of personal freedom and the democratic and political rights of the individual citizen'.[70] The assertion and successful achievement of such rights depend on a measure of cohesion and agreement which is completely lacking on the international level.[71] To a great extent the rights which are recognised in municipal life have been secured 'by overwhelming pressure or on the point of the threat of rebellion or revolution'[72] and frequently as a result of libertarian trends consequent upon religious upheavals in the seventeenth and eighteenth centuries. Modern international society may be considered as, at present, just passing through this stage of upheaval: 'We have antagonisms now as deep as those of the Reformation and its reactions which led to the Thirty Years' War. But now they are spread over the whole world instead of only over a small part of Europe. We have, to some extent, the geographical division of the Mongol invasion in the thirteenth century, only more ruthless and more thorough'.[73]

In such a division it is easy to make use of lofty conceptions of human rights as a standard of criticism of the conduct of others, but it is rare for the same standards to be used for self-examination. This was noticeable in the debates that led to the promulgation of the Universal Declaration of Human Rights. It has been equally obvious in the cold war relations between East and West[74] and in the discussions in the Council of Europe prior to the adoption of the European Convention on Human Rights.[75] When statesmen look at the position of individuals not their own nationals abroad, their attitude is conditioned by the realities of the political situation. In the abstract, they tend to regard the treatment meted out by their own countries as the

[70] *Op. cit.*, note 11 above, 1st edition, 1941, p. 382.
[71] Cf. de Visscher, *op. cit.*, note 14 above, p. 212.
[72] *Op. cit.*, note 11 above, 2nd ed. 1951, p. 644.
[73] Sir Winston Churchill opening the Defence Debate, March 1, 1955, 537 *Hansard* (House of Commons), col. 1897.
[74] Cf. G. Schwarzenberger, 'The Impact of the East-West Rift on International Law' (1950) 36 *Grotius Transactions*, p. 229, at pp. 244–245.
[75] Cf. the writer's 'The European Convention of Human Rights' (1951) 5 *World Affairs*, p. 432.

standard by which all should live and to describe States which do not satisfy that standard as if they fell short of civilised behaviour. They are unwilling, however, to take any concrete steps which would result in their being able to treat such States as having broken international law and liable to make reparation. It has been aptly said that 'in the relations between Western nations, which have largely forgotten their spiritual heritage, and Eastern nations, which have either jettisoned it or never shared it, the efforts to agree on any joint definition and protection of human rights have degenerated, of necessity, into aimless and venomous battles of words between the champions of East and West. Discrimination against negroes in the United States[76] and forced labour camps in the Soviet Union existed before, during and after the Second World War.[77] Like the concentration camps of the Third *Reich,* such black spots are conveniently forgotten and remembered, as the expediencies of world politics dictate'.[78]

The ideological function of concepts of human rights at the present day suggests the need for caution when examining the extent to which such alleged rights amount to general principles of law recognised by civilised nations. This is particularly so as this concept itself, in an international society ruled by power politics, often amounts to no more than a means of asserting that one's own conduct is civilised and in accordance with international law, while that of one's political enemy is not. Further, as has been indicated, the conditions of social life in municipal society differ from those in international society, and in the former it is far easier for principles of a true community law based on co-ordination to develop.

A convenient way to indicate one of the reasons why human rights, even though they amount to principles of law generally recognised by civilised nations, cannot amount to general principles recognised by civilised nations and, as such, part of international law is to outline the manner in which one or two of these rights have developed. A historical analysis shows that what have become described as inalienable rights are the product

[76] Cf. the writer's 'Human Rights and the Colour Problem' (1950) 3 *Current Legal Problems,* p. 236; 'Human Rights and Colour Discrimination' (1950) 3 *International Law Quarterly,* p. 422; 'The Legality of Jim Crow Regulations', *ibid.,* p. 590.

[77] Cf. D. J. Dallin and B. I. Nicolaevsky, *Forced Labour in Soviet Russia,* 1947; *op. cit.,* note 60 above, p. 98.

[78] *Op. cit.,* note 11 above, p. 712.

of a particular need in a particular social grouping at a particular time. What is necessary for one group may not be equally necessary in another group, even though the same surrounding circumstances be present, for local traditions also have a part to play.[79]

It would appear that in western society many of the rights on which much store is now set, and which are often described as if they were as old as man himself and enjoyed by him as his birthright, are in fact often products of economic thought in the 16th and 17th centuries. Thus, it is contended that the right of religious toleration and, consequent thereon, the right of political liberty are inextricably interwoven with the duty of charity and the right of property. 'It was in the seventeenth century that the phrase was coined: "In essentials unity, in non-essentials liberty, in all things charity"',[80] and the Church started from the premise that it was incumbent upon those who possessed worldly goods to extend charity to those who were not so fortunate, and especially to the Church which could do charitable work at large. When the Church itself became a large landowner in this way the emphasis changed from the duty of charity to the right of property. This concept of the right of property had become so firmly founded by the middle of the eighteenth century that Samuel Adams could write in 1774 that the claim to no taxation without representation was man's 'indisputable privilege—it was founded on the eternal law of equity. It is an original right of nature. No man in a state of nature can justly take another's property without his consent. The Rights of Nature are happily interwoven in the British Constitution. It is its glory that it is copied from nature. It is an essential part of it that the supreme power cannot take from any man any part of his property without his consent'.[81] Even as late as 1906 Winslow, J., in *Nunemacher* v. *State*,[82] rejected as unconstitutional a Wisconsin statute which imposed an inheritance tax, even though the Constitution of Wisconsin did not guarantee property rights: 'The statute violated natural rights

[79] Cf. Clark, 'Early Modern Period', 2 Sir Ernest Barker, *The European Inheritance*, 1954, pp. 119–120.

[80] *Ibid.*, p. 120. Cf. also R. H. Tawney, *Religion and the Rise of Capitalism* (Pelican ed.) 1938, pp. 140–141.

[81] 1 *Works*, 1946, pp. 46, 53 (cited J. Stone, *The Province and Function of Law*, 1947, p. 258).

[82] 129 Wis. 190 at 200–202 (cited *ibid.*, p. 258).

of property and inheritance "existing in the people prior to the making of any of our constitutions. . . . The right to take property by inheritance or will has existed in some form among civilised nations from the time when the memory of man runneth not to the contrary"'.

It has likewise been pointed out that 'a society of peasants could be homogeneous in its religion, as it was already homogeneous in the simple uniformity of its economic arrangements. A many-sided business community could escape constant friction and obstruction, only if it were free to absorb elements drawn from a multitude of different sources, and if each of those elements were free to pursue its own way of life, and—in that age the same thing—to practise its own religion. . . . English economic organisation had long been elastic enough to swallow Flemish weavers flying from Alva, and Huguenots driven from France. But the traditional ecclesiastical system was not equally accommodating. It found not only the alien refugee, but its homebred sectaries, indigestible. Laud, reversing the policy of Elizabethan Privy Councils, which characteristically thought diversity of trades more important than unity of religion, had harassed the settlement of foreign artisans, . . . and the problem recurred in every attempt to enforce conformity down to 1689. . . . When the collision between economic interests and the policy of compulsory conformity was so flagrant, it is not surprising that the economists of that age should have enunciated the healing principle, that persecution was incompatible with prosperity, since it was on the pioneers of economic progress that persecution principally fell. "Every law of this nature" . . . is not only "expressly against the very principles and rules of the Gospel of Christ", but is also "destructive to the trade and well-being of our nation by oppressing and driving away the most industrious working hands, and depopulating, and thereby impoverishes our country!"'.[83] It was frequently contended that one of the reasons for the commercial success of the Netherlands was its religious toleration and that the wealthiest towns of England were those in which there was most nonconformity, while India and the Ottoman Empire were cited to prove that

[83] Tawney, *op. cit.*, pp. 186–187, citing *A Letter from a Gentleman in the City to a Gentleman in the Country about the Odiousness of Persecution*, 1677, p. 29.

'economic progress is compatible with any religion, [for] the class which is its vehicle will always consist of the heterodox minority, who "profess opinions different from what are publicly established"'.[84]

In the light of what has been said it is not surprising that what is enjoyed and protected on the municipal level is neither enjoyed nor protected in the international sphere. There is not sufficient in common among the nations of the world, nor in their historical development, to allow human rights, even though they may be generally recognised in the various systems of law, to be considered as general principles of law recognised by civilised nations and, as such, rules of international law. It is only in a federation that there is found anything approaching that community spirit which is essential to make people as interested in ensuring that strangers enjoy the same rights as they do themselves and guaranteeing them by constitutional means. Care must be taken, however, not to mistake words for deeds, for what may appear to be a federal State may really be a pseudo-federal State,[85] and 'if absolute rulers choose to pervert the meaning of words, no subject of any of these totalitarian systems can prevent them from transforming truth into falsehood. With modern techniques of mass control, the ruling minority can even pervert their robots in a short spell of time into believing that they live in a democracy and enjoy all the benefits of basic human rights and of fundamental freedoms'.[86] Even on the truly federal level, the history of political and legal development in the United States shows the difficulties that exist.[87] Even today there are disputes as to the treatment of Negroes, and the Supreme Court decision in the *Segregation Cases,* 1954,[88] left unsolved as much as it solved.

One must not ignore the comment by Field, J., in *Butcher's Union Co.* v. *Crescent City Co.*,[89] (1883), that 'as in our inter-

[84] *Ibid.*, p. 187, citing Petty, *Political Arithmetic,* 1690, p. 23. Cf. also H. J. Laski, 'Economics in the Light of the Past', 1 *Encyclopaedia of Modern Knowledge,* n.d., p. 361, at pp. 363–364.

[85] *Op. cit.*, note 11 above, pp. 79–83.

[86] *Ibid.*, p. 646.

[87] Cf. T. I. Emerson and D. Haber, *Political and Civil Rights in the United States,* 1952.

[88] *Brown* v. *Board of Education,* and others, 347 U.S. 483, 497. Cf. the writer's 'The Right to Learn' (1954) 3 *Indian Year Book of International Affairs.*

[89] 111 U.S. 746 at 756–757.

course with our fellow men certain principles of morality are assumed to exist without which society would be impossible, so certain inherent rights lie at the foundation of all action, and upon a recognition of them alone can free institutions be maintained'. In this field, however, it is equally important to recall the words of Bentham: 'Right . . . is the child of law: from real laws come real rights; but from imaginary laws, from laws of nature, fancied and invented by poets, rhetoricians, and dealers in moral and intellectual poisons, come imaginary rights, a bastard brood of monsters. . . . Natural rights is simple nonsense: natural and imprescriptible rights, rhetorical nonsense —nonsense upon stilts. But this rhetorical nonsense ends in the old strain of mischievous nonsense: for immediately a list of the pretended natural rights is given, and those are so expressed as to present to view legal rights'.[90]

[90] *Anarchical Fallacies,* 1824, 2 *Collected Works* (Bowring ed.) 1843, pp. 523, 501.

## 11

# JUSTICE AND EQUITY IN INTERNATIONAL LAW

BIN CHENG

JUSTICE, equity and law are three interwoven notions. In the case of *Norwegian Shipowners* (1922), the Permanent Court of Arbitration was asked by the parties to decide the claims presented 'in accordance with the principles of law and equity'. Having pointed out that in international arbitration, 'if no special principles are prescribed to the arbitrator, he must doubtless decide in the first place in accordance with international law',[1] the Court went on to say—

> 'The words "law and equity" used in the special agreement of 1921 cannot be understood here in the traditional sense in which these words are used in Anglo-Saxon jurisprudence. The majority of international lawyers seem to agree that these words are to be understood to mean general principles of justice as distinguished from any particular system of jurisprudence or the municipal law of any State'.[2]

Thus, the Court uses the terms law, justice and equity almost synonymously.

It is interesting to note that the Court assumes the objective existence of general principles of justice, equity and law in the international sphere, principles which are independent of 'any particular system of jurisprudence or the municipal law of any State', but are, as the Court said, 'common to all civilised nations'.[3] This assumption is indeed shared by both the constitution of the Permanent Court of Arbitration[4] and the Statute

[1] 1 *United Nations Reports of International Arbitral Awards* (hereinafter cited UNRIAA), p. 307, at p. 331.
[2] *Ibid.*
[3] *Ibid.*
[4] Cf. Hague Convention for the Pacific Settlement of International Disputes, 1899, art. 15; same, 1907, art. 37, which describe international arbitration as having for its object the settlement of international disputes 'on the basis of respect of law'.

of the World Court.[5] Article 38 of the Statute of the World Court provides that the Court shall apply, as an integral part of international law, 'the general principles of law recognised by civilised nations'.[6] The Statute, therefore, also assumes that despite the differences in civilisation and legal method of the members of the international society,[7] there are certain legal principles which are accepted by them all as of objective and universal validity.

The question may be asked whether the general principles of justice, law and equity as applied in international law are those recognised by civilised nations or those accepted by all States, using the term 'nation' in its strict sense. It would appear from the use of the qualification 'civilised' that the intention is to refer to the former rather than to the latter.[7a] That, as applied to nations, the use of this qualification is perhaps not redundant is to some extent illustrated by the *Abu Dhabi Arbitration* (1951). In this case, the arbitrator, when construing the concession granted by the Sheikh of Abu Dhabi to the Petroleum Development (Trucial Coast), Ltd., recognised that 'if any municipal system of law were applicable, it would prima facie be that of Abu Dhabi'. But he found that 'no such law can reasonably be said to exist', and proceeded to apply instead what he termed the 'modern law of nature'.[8] Thus for the purpose of determining the general principles of justice, law and equity, recognised by civilised nations, only such systems as merit the name law are to be considered.[9] Moreover, from a formal standpoint, it may be said that if the term 'nation' were used in the sense of 'State', the use of the qualification 'civilised' would have been inept. Full membership of the international society implies equality with all other members, and to declare that a

[5] See further the writer's *General Principles of Law as Applied by International Courts and Tribunals,* 1953, *passim,* and especially p. 390 *et seq.*

[6] See *op. cit.*

[7] Cf. art. 9 of the Statute and comments thereon by the Advisory Committee of Jurists set up to draft the Statute, *Procès-verbaux,* 1920, pp. 709–710.

[7a] See *op. cit.* in note 5 above, pp. 9, 25.

[8] 1 *International and Comparative Law Quarterly* (1952), p. 247, at pp. 250–251.

[9] Cf. G. Schwarzenberger, *William Ladd: An Examination of an American Proposal for an International Equity Tribunal,* 1936, p. 59: 'The conception of justice and equity can be made more concrete on the basis of the idea . . . that these principles must be in accordance with the standards of "civilised" nations'.

State is 'uncivilised' would amount in effect to affirming that that State is unfit for membership in the international society, from which State, it might be argued, recognition may be withdrawn, thus making it an outlaw.[10] Indeed when the European law of nations began to expand into the present universal international law, entities outside Europe, the law or judicial organisation of which did not conform to the European standards, were in fact not granted immediate full membership of the international society: the regime of extraterritoriality reduced their status at best to that of associate membership.

If the present international society is almost universal in scope and includes States with different civilisations and legal systems, this is because it is assumed that members of the international society have all attained the requisite standard of civilisation, and that they accept the basic concepts of justice, law and equity which are and have been at the foundation of international law. It matters little whether these principles are now accepted because they have always been shared by all forms of civilisation and legal systems on account of their intrinsic universal validity or because all legal systems and civilisations have now adopted them. The fact that States may from time to time fall short of the international standards of justice, law and equity does not of itself invalidate this assumption.[11]

### INTERNATIONAL JUSTICE

The operation of the standard of justice accepted by civilised nations in the international sphere may best be seen by considering two different sets of international relations: first, a State's treatment of aliens, secondly, a State's dealings with other States, even though it is true that a State's duties with regard to aliens are strictly speaking only duties towards the aliens' home State.

[10] Cf. G. Schwarzenberger, *International Law and Totalitarian Lawlessness*, 1943, p. 99 *et seq.* See also the same author's 'The Standard of Civilisation in International Law' in the present series of lectures.

[11] Cf. *Cotesworth & Powell Case* (1875), Colombia/G.B. Colombia was held liable for a denial of justice to a British national. 'This involves no humiliation to the Colombian people and nation, because every nationality, however enlightened may be its people, however admirable and just its political and judicial systems, is far from being sufficiently perfect to prevent exceptional cases of judicial corruption, or gross criminal conduct on the part of its high officials' (Moore, 2 *Int. Arb.*, p. 2050, at p. 2085).

*'Denial of Justice'*

In the former case, international law requires that justice should be done to aliens and not denied them. Denial of justice constitutes the most important, if not the sole, basis of diplomatic intervention on behalf of nationals abroad. The term has, however, been variously interpreted.[12]

In a narrow interpretation of the term, justice is said to have been afforded to aliens if they are allowed access to the local courts and the municipal law of the country is properly administered in suits in which they are involved.[13]

However, in a wider interpretation of the concept, legal justice has been extended to include the administration not only of civil, but also criminal justice. The failure to administer the criminal law of the country, which must itself conform to the minimum standards of international law, in accordance with international standards, either for the protection of the alien or against him, has been held to constitute a denial of justice, involving the responsibility of States. Denial of justice includes, therefore, on the one hand, failure by the State to take adequate measures to apprehend, prosecute and punish persons guilty of crimes against aliens.[14] It includes, on the other hand, cases of unlawful arrest, detention or harsh treatment of aliens during imprisonment,[15] although cases of maladministration of justice, whether civil or criminal, may be more properly called instances of injustice. As Roscoe Pound tersely put it in the *Cayuga Indians Case* (1926), in a denial of justice, 'there is an injustice antecedent to the denial, and then the denial after it'.[16]

This leads to the still wider meaning of the term denial of justice, which includes within this notion all injuries suffered by an individual in a foreign country, for which he has, after exhausting local remedies, not been able to obtain redress. This includes both cases involving the direct responsibility of the State, and those involving its indirect responsibility. It matters

[12] Cf. G. G. Fitzmaurice, 'The Meaning of the Term "Denial of Justice"' (1932) 13 *B.Y.I.L.*, p. 93; O. J. Lissitzyn, 'The Meaning of the Term "Denial of Justice" in International Law' (1936) 30 *A.J.I.L.*, p. 632.

[13] See *Cotesworth & Powell Case* (1875), *loc. cit.*, p. 2081; on international responsibility arising from refusal of access to Courts, see further Freeman, *Denial of Justice*, 1938, p. 215 *et seq.*

[14] See cases cited in Freeman, *op. cit.*, p. 367 *et seq.*

[15] See cases cited *ibid.*, p. 196 *et seq.*

[16] G.B.-U.S.Cl.Arb. (1910), Nielsen's Report, p. 203, at p. 258.

not whether the denial of justice springs from the maladministration of municipal law or from a State's municipal law failing to measure up to international standards, nor whether it springs from the failure of a State's remedial organs to give proper redress or from the absence of such organs.[17]

It may, however, be said that whether the term denial of justice is used in a narrow or a wide sense, justice, as here used, merely implies compliance with the rules of international law in the treatment of aliens, and covers, therefore, only legal justice. While legal justice may not always correspond with subjective or substantive justice, it should, however, be observed that the rules of international law with which States must comply in the treatment of aliens, in order not to commit a denial of justice, are no more and no less than standards which are judged just and reasonable by civilised mankind. Thus, in the *Neer Case* (1926), Commissioner Nielsen said in his concurring opinion—

> 'It may perhaps be said with a reasonable degree of precision that the propriety of governmental acts should be determined according to ordinary standards of civilisation, even though standards differ considerably among members of the family of nations, equal under the law'.[18]

*Jus Suum Cuique Tribuere*

In turning to examining the role of justice in the wider aspects of international relations, it may be suggested that the essence of justice consists in the proper balance of the interests of the parties. As the Umpire of the Franco-Venezuelan Mixed Claims Commission (1902) said in the *Frierdich & Co. Case,* while discussing the rights and wrongs of the parties, 'if the conditions on both sides are regarded as producing an equilibrium, justice is done'.[19]

In law, it is well to remember, however, as the sole arbitrator Max Huber pointed out in the *Palmas Case* (1928), that 'international law, like law in general, has the object of assuring the co-existence of different interests which are worthy of legal pro-

[17] For distinction between direct and indirect State responsibility and the role of the Local Remedies Rule, see *op. cit.* in note 5 above, pp. 177–180, 201.

[18] Mex.-U.S. Gen.Cl.Com. (1923), *Op. of Com. 1927,* p. 71, at p. 79; see also the majority opinion, at p. 73. Cf. also Fran.-Ven. Mixed Cl.Com. (1902): *Frierdich & Co. Case,* Ralston's Report, p. 31, at pp. 41–42.

[19] Ralston's Report, p. 31, at p. 43.

tection'.[20] and some of the interests protected may not be entirely consonant with abstract justice or morality. Thus the umpire of the British-United States Claims Commission (1853), in the case of the *Enterprise* (1854), held that in the year 1835 slavery was not contrary to the law of nations, although at the same time he recognised that 'no one can deny that slavery is contrary to the principles of justice and humanity, and can only be established in any country by law'.[21] The term as here used by the umpire corresponds more to the Aristotelian sense of justice as perfect virtue and is essentially the proper equilibrium of all conditions and interests in a society assessed according to value-judgments which are not necessarily of a juridical character and which are moreover susceptible of changes with time and place. Justice in this sense often constitutes the rational foundation of the law, but it may be a *ratio legis ferendae* as well as a *ratio legis latae*.

Within the framework of the legal order, justice, sometimes termed formal justice, consists, as Ulpian has defined it, in the 'constant and persevering will to give every one that to which he has right' *(Justitia est constans et perpetua voluntas jus suum cuique tribuendi)*. Assuming that the legal system has established a just balance in the interests protected, this precept ensures justice by maintaining this equilibrium. As a practical demonstration of the intimate relationship between justice and law, it will be found that the general principles of law recognised by civilised nations which form an integral part of international law[22] furnish a number of rules whereby this end is achieved in the international sphere.

One of the most important of these is the principle of individual responsibility, which means that every person is responsible for his own acts and, unless expressly provided by law or by agreement, only for his own acts.[23] If the existing equilibrium of rights and interests in a legal order is disturbed by other than a human agency, if, in other words, the disturbance is the result of *casus fortuitus* or *vis major,* then, unless liability

[20] PCA, 2 UNRIAA, p. 829, at p. 870; see also Spanish Zone of Morocco Claims (1923); *Rapport III* (1924), 2 UNRIAA, p. 615, at p. 640.
[21] Moore, 4 *Int.Arb.*, p. 4349, at p. 4374; Hornby's Report, p. 332, at p. 374.
[22] See *op. cit.*, in note 5 above.
[23] See *ibid.*, p. 208 *et seq.*

has been expressly laid down by law on, or assumed by agreement by, some person, no one is held liable for the loss or damage. The burden of shouldering such a loss or damage becomes a problem of risk, which in international law, as well as in other legal systems, is solved pragmatically by law with more or less rational justification. But apart from cases of *casus fortuitus* and *vis major,* the principle of individual responsibility ensures that every unlawful disturbance of the existing equilibrium of rights and interests by a human agency shall be accounted for. How it thus protects every person in his rights and interests may be seen from four different angles.

First, as a direct application of this principle of individual responsibility, every person who, by his own wrongdoing or negligence, has brought a loss upon himself must himself bear that loss. Secondly, every person who in the rightful exercise of his rights causes a loss to another has no legal duty to redress the latter's loss, even though sometimes there may be moral grounds for giving compensation. Thirdly, every person who, without right, causes a loss to another has the legal duty integrally to repair the latter's loss. As a corollary thereof, every person who suffers a loss as a result of another's unlawful act has a right to integral reparation. Finally, under the doctrine of unjust enrichment or enrichment without cause, every one who has, without valid ground, enriched himself at the expense of another must restore the amount of his enrichment to the latter. While this doctrine cannot yet, without qualification, be called a general principle of law recognised by civilised nations or a firmly established principle of international law, nevertheless many rules of international law can be traced to this doctrine and it has, moreover, been in fact applied in a number of cases.

As regards the principle that every person shall be alone responsible for loss or damage of which he himself is the cause, two different types of situation may be examined. In the first type of case, although a person may not have been the direct cause of his loss, he has committed acts which give rise to legitimate measures on the part of others which measures cause him the loss complained of. He is, therefore, the *causa causans* of his own loss and must himself bear the consequences of his own initial unlawful act. Thus if a State fails in its duty of maintaining neutrality in time of war between third States, it is not

able to complain of losses suffered as a result of legitimate measures taken by one of the belligerents for the protection of its rightful interests, although, when military measures are resorted to, such measures must be in accordance with international rules of warfare.[24] The same applies to losses inflicted in the course of legitimate reprisals, provided that the acts of reprisal are not out of all proportion to the original wrong,[25] and claims by States on behalf of their nationals who have suffered injuries or losses as a result of unlawful resistance to authorities,[26] or other unlawful activities,[27] when the actions of the authorities are reasonable and not arbitrary.[28] This type of case is often merely a corollary of the next principle to be considered, namely, *Neminem laedit qui suo jure utitur,* in the sense that whatever is rightfully done as a result of the initial wrong of another involves the person in no liability towards the latter.

As regards the second type of case, this arises where the author of the self-inflicted loss is at the same time the victim of an unlawful act on the part of another. While, as will shortly be seen, the victim of an unlawful act is entitled to receive integral reparation for all the injury which he may have suffered as a result of the unlawful act, he must, under international law, himself bear those losses which are the result of his own act or inaction. This is clearly illustrated in the *Angola Case* (1928, 1930), where Germany was held liable only for the proximate consequences of her unlawful military incursions into the Portuguese colony, while Portugal herself remained responsible for the consequences of her own negligence in re-establishing order after the withdrawal of the German forces.[29]

Concerning the second principle, *Neminem laedit qui suo jure utitur,* little comment is perhaps required. In international law, this general principle of law was expressly invoked and applied in the case of the *Closure of Buenos-Aires* (1870) in

[24] See *e.g.*, Greco-German M.A.T.: *Coenca Brothers Case* (1927), 7 *Recueil des décisions des Tribunaux arbitraux mixtes* (hereinafter cited T.A.M.), p. 683, at pp. 686–687; *op. cit.*, in note 5 above, p. 88 *et seq.*

[25] See *e.g.*, Portugo-German Arbitration: *Angola Case* (1928, 1930), 2 UNRIAA, p. 1011; *op. cit.*, in note 5 above, p. 97 *et seq.*

[26] See *e.g.*, *James Pugh Case* (1933), U.K. (for Irish Free State)/Panama, 3 UNRIAA, p. 1439; Peruvian-U.S. Cl.Com. (1863): *Brand Case,* Moore, 2 *Int.Arb.*, p. 1625; *op. cit.*, p. 59 *et seq.*

[27] *E.g.*, *Frierdich & Co. Case, loc. cit.*

[28] *Op. cit.*, in note 5 above, pp. 59 *et seq.*, 132 *et seq.*

[29] 2 UNRIAA, p. 1011, at pp. 1032–1033, 1076.

which the arbitrator dismissed a claim by Great Britain for losses suffered by British merchantmen as a result of the closure of the port by the Argentine authorities,[30] although here again it should be remembered that this principle is limited by the general principle of good faith which forbids the abuse of a right.[31] Moreover, the absence of legal liability does not of course preclude the payment of compensation *ex gratia,* as an act of moral rather than legal justice.[32]

The third and in a way the most important principle implementing the precept of *suum cuique tribuere* is that every person who suffers a loss as the result of the unlawful act of another is entitled to have such loss made good by the wrongdoer. This principle—the principle of integral reparation for an unlawful act[33]—has been most clearly and adequately expressed by the Permanent Court of International Justice in the *Chorzów Factory Case* (Merits) (1928)—

> 'The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law'.[34]

The principle of integral reparation ensures, therefore, that every unlawful disturbance of the existing equilibrium of legally pro-

30 La Pradelle-Politis, 2 *Recueil des Arbitrages internationaux,* p. 637, at p. 659.

31 See further *op. cit.,* in note 5 above, p. 120 *et seq.,* where this theory has been more fully developed under four separate headings: the malicious exercise of a right, the fictitious exercise of a right to evade an obligation, the theory of the interdependence of rights and obligations, and the abuse of discretion.

32 Cf. Brit.-U.S. Cl.Arb. (1910): *Hardman Case* (1913), Nielsen's Report, p. 495, at p. 497; *op. cit.,* in note 5 above, pp. 64 *et seq.,* 164 *et seq.*

33 See *op. cit.,* in note 5 above, p. 233 *et seq.*

34 A 17, p. 47.

tected interests should be redressed by the wrongdoer, who must, as the Court said, 'wipe out all the consequences of the illegal act'. The person who has suffered as a consequence of another's unlawful act must be restored not only to the position in which he was before the commission of the unlawful act, but to the position in which he would probably have been, had the unlawful act not been committed.

It is indeed interesting to observe in the application of this principle how closely international law seeks to assure to every person what is legally his due. Thus, while the wrongdoer is required to repair integrally the losses he has caused, he is not required to do more. Therefore, if no damage, whether material or moral, has in fact been caused, the victim would have to be satisfied with a mere declaratory judgment[35] with perhaps one shilling nominal damages,[36] but the wrongdoer would not be required to pay what are known as punitive damages.[37] International tribunals have frequently declared that the mere fact that a person has been the object of an unlawful act must not be turned into a source of enrichment for him.[38] He should recover what is his due; but no more. Any reparation which he might receive in excess of his actual loss would indeed constitute an unjust enrichment.[39] Looking at the matter from the other end, international tribunals carefully guard against making the wrongdoer pay for a loss twice over[40] or pay damages in respect of losses which have not been caused by him, but have been caused by either the contributory negligence of the victim or the concurrent fault of third parties.[41]

In the complicated task of determining the various chains of causation, international tribunals have resort to the general prin-

[35] Cf. *e.g.*, PCIJ: *Mavrommatis Jerusalem Concessions Case* (1925), A 5, p. 51.

[36] Cf. *e.g.*, Brit.-U.S. Cl.Arb. (1910): *Fijian Land Claims: Brower Case* (1923), Nielsen's Report, p. 612; *U.S. & Paraguay Navigation Co. Case* (1860), Moore, 2 *Int.Arb.*, p. 1485, at pp. 1506–1507.

[37] German-U.S. Mixed Cl.Com. (1922): *Lusitania Cases* (1923), *Dec. & Op.*, p. 17, at pp. 30–31; see further *op. cit.*, in note 5 above, p. 235 *et seq.*

[38] Cf. e.g., *Delagoa Bay Railway Arbitration* (1900), G.B., U.S./Portugal, Martens, II (30) N.R.G., p. 329, at p. 413.

[39] Cf. *e.g.*, Mex.-U.S. Gen.Cl.Com. (1923): *Cook Case* (Docket No. 663) (1927), *Op. of Com. 1927*, p. 318, at p. 323; *Id.: Francis J. Acosta Case* (1928), *Op. of Com. 1929*, p. 121, at p. 122.

[40] Cf. *e.g.*, ICJ: *Reparation for Injuries suffered in the Service of the United Nations* (1949), Adv.Op., ICJ Reports 1949, p. 174, at p. 186.

[41] Cf. *e.g.*, *Angola Case* (1928, 1930), *loc. cit.*, pp. 1031–1033, 1076.

ciple of proximate cause and thus make each person responsible only for the proximate consequences of his own act, unless it be proved that the damage had actually been foreseen or intended by the wrongdoer.[42] This principle of proximate cause, as the Commissioners in the *Samoan Claims* (1904) said, is found 'to work substantial justice as between all parties' in international law as well as in municipal law.[43]

Lastly, as regards the doctrine of unjust enrichment,[44] it would appear that neither municipal law nor international law has as yet formulated any hard and fast rules on the subject. In the *Dickson Car Wheel Co. Case* (1931), Commissioner Fernández MacGregor, who, in his opinion on behalf of the Mexican-United States General Claims Commission (1923), seemed to dispute the applicability of this doctrine in international law, said—

> 'The interpretation of the theory of unjust enrichment has encountered serious difficulties in its practical application in municipal law. There is no doubt that at the present time that theory is accepted and applied generally by the countries of the world, even in the absence of specific law, but the difficulty rests in fixing the limits within which it can and must be applied'.[45]

However, as the Commissioner himself pointed out, the doctrine was unnecessary for the determination of that particular case.[46]

But in the previous year the Arbitral Tribunal in the case of *Lena Goldfields, Ltd.* (1930), after having found that the doctrine of unjust enrichment was recognised in France, Germany and in Scottish law,[47] though not perhaps fully in English law, did in fact apply it to international law and awarded the claimants the sum of £125,965,000 with 12 per cent interest for property which the company had invested in Russia and of which the Soviet Government had been enriched as a result of the latter's action in preventing the former from performing its concession-contract.[48]

[42] See further *op. cit.*, in note 5 above, p. 241 *et seq.*
[43] Germany/U.K., U.S. Quoted in Whiteman, 3 *Damages*, p. 1778, at p. 1779.
[44] Cf. G. Schwarzenberger, *International Law*, Vol. 1, 1949, p. 230 *et seq.*
[45] *Op. of Com. 1931*, p. 175, at pp. 184–185.
[46] *Ibid.*, pp. 185–186.
[47] In *Cantiare San Rocco, S.A.* v. *Clyde Shipbuilding Co., Ltd.* [1924] A.C. 226.
[48] *The Times*, London, September 3, 1930, p. 7.

Indeed, if the rules of international law concerning a State's taking of alien private property within its jurisdiction are examined, it will be found that the duty of the State to pay compensation has been based largely on the consideration of enrichment. A State in the exercise of its sovereign rights within the limits of its jurisdiction may often find it necessary to take action involving losses to alien private property or depriving aliens thereof. A State, under the rules of international law, is not obliged in every case to compensate the alien for his losses. Precedents would seem to show that, assuming the State's action to have been legitimate, whether compensation is due or not depends essentially on whether the State has benefited from the use of the property or not.[49] The rationale of this doctrine was discussed by the Mexican-United States Claims Commission (1868) in the *Putegnat's Heirs Case* (1871),[50] and it is graphically illustrated by the *Sucrerie de Roustchouk Case* (1925), decided by the Belgo-Hungarian Mixed Arbitral Tribunal.[51] The United States-Spanish Treaty Claims Commission under the Act of March 2, 1901, put it thus tersely in its Final Report—

> 'The Commission made an allowance in every case where the property was used or consumed by the Spanish forces for their benefit, the theory being that whenever it appeared that the Spanish forces had been advantaged by the use or consumption of private property it should be paid for'.[52]

A different field where the doctrine of enrichment has been invoked is that of State succession. In the *Ottoman Public Debt Arbitration* (1925), the sole arbitrator held that 'it is not possible

[49] The subject has been more fully treated by the present writer in *op. cit.*, in note 5 above, p. 36 *et seq.*, especially p. 47 *et seq.*, also pp. 57–58.

[50] Moore, 4 *Int.Arb.*, p. 3718, at pp. 3719–20.

[51] 5 T.A.M., p. 772. Two barges belonging to the claimant company were sunk by the Hungarian military authorities in 1914 in anticipation of Serbian troops crossing the Danube. This step was considered as a purely military measure, having a strategic or tactical aim and nature and involving no duty on the part of Hungary to indemnify the claimant company. The subsequent refloating of one of the two barges and its use by the Hungarian military authorities were, however, regarded as a measure of requisition involving a duty to pay compensation.

[52] 24 *Spanish Treaty Claims Commission* (1910), p. 150. See also Mexican-U.S. Cl.Com. (1868): *Thomas C. Baker Case*, Moore, 4 *Int.Arb.*, p. 3668, at pp. 3668–3669: 'For those articles which the troops really took for the use of the Mexican army, and which were so used, the Umpire thinks that the Mexican Government is bound to compensate the claimant'.

to say, notwithstanding the many precedents, that the Power to which a territory has been ceded is *ipso facto* held liable for a proportionate part of the public debt of the State of which it had hitherto been a part'.[53] The Rumano-Hungarian Mixed Arbitral Tribunal, however, in the *Koranyi Case* (1929) had the following to say—

> 'With regard to the liability of a successor State for debts of an administrative character outstanding at the time of a transfer of territory, which are not guaranteed by a mortgage upon an immovable situated in the said territory, it is above all necessary to establish the purpose for which the loans were originally raised, and the purpose for which the money has been applied. Where the debt has been contracted in the interests of the territory subsequently transferred, and the money has served in the past or will continue to be used in future to obtain some improvement or benefit to the said territory, it would be only just and equitable to make the successor State liable for such a debt on this ground. Where this is not the case, there is no reason whatever for making it responsible for the debt'.[54]

The two cases are not irreconcilable and the latter seems to confirm a practice accepted in many treaty settlements, a practice which even if it may not fall strictly within the notion of *condictio sine causa* is nevertheless within the concept of *suum cuique tribuere*.

Another instance showing the operation of the doctrine of unjust enrichment is the voluntary return by the United States to Mexico of the money received in respect of the awards in the *La Abra Silver Mining Co. Case* and the *Benjamin Weil Case* decided by the Mexican-United States Mixed Claims Commission (1868), which, as was later established, had been misled by the fraud of the claimants.[55]

A number of international decisions also exist concerning unjustified enrichment as a result of the nullity or cancellation of contracts. In such cases, claims have generally been made

[53] 1 UNRIAA, p. 529, at p. 573. Transl.
[54] 8 T.A.M., p. 980, at p. 982. Transl.
[55] See Moore, 2 *Int.Arb.*, pp. 1324–1348; U.S. For.Rel., 1902, p. 781 *et seq.*; *Counter Case of the U.S.*, Appendix, U.S. and Venezuelan Arbitration at The Hague (*Orinoco Steamship Co. Case*), p. 92; see *op. cit.* in note 5 above, pp. 159–160, 320 note 82 and p. 359.

with success for the recovery of any unjust enrichment by one of the parties.

In the *Turnbull/Manoa Co., Ltd./Orinoco Co., Ltd. Case,* the United States-Venezuelan Mixed Claims Commission (1903) decided that the Venezuelan Government must repay to the Orinoco Co., Ltd. the sum of 120,000 bolivars with interest from 1898, when the said company paid the same sum to the Venezuelan Government 'for rights purchased on a judicial sale . . . which rights, as evidence shows, the Republic could not dispose of, and out of the possession of which rights claimant was expelled by the proper authorities of the Republic'.[56] The Commission held: 'This unduly received sum of 120,000 bolivars has to be restored to him who unduly paid it'.[57] This case presents the example of unjust enrichment *sensu stricto,* in the sense that the sum was unduly paid and unduly received. In such cases, restitution of the undue enrichment must be integral, i.e., with interest.

Such enrichment is to be distinguished from that resulting from the annulment of a contract because of *force majeure.* This distinction was emphasised by the Rumano-German Mixed Arbitral Tribunal in *Direction générale des Ports et Voies de Communication par Eau* v. *A. Schwartz et Cie.* (1927), shortly to be referred to. An example of the latter type of enrichment is the *Home Insurance Co. Case* (1926). In this case the Mexican Government, as operator of the Mexican railroads, had contracted to carry two consignments of coffee to New Orleans, one from Huistla, the other from Tapachula. *En route,* the coffee was seized by revolutionaries at Puerto Mexico. The Mexican-United States General Claims Commission (1923) held that the Mexican Government, in that capacity, 'is therefore obligated to pay to the claimant the division of the through-freight charges from Puerto Mexico to New Orleans, for which payment has been made but no service rendered'.[58] No interest was awarded.

A number of similar cases came before the Mixed Arbitral Tribunals set up after the First World War when the Peace Treaties declared that contracts with enemy nationals were can-

[56] *Ven.Arb. 1903,* p. 200, at p. 246.
[57] *Ibid.*
[58] *Op. of Com. 1927,* p. 51, at p. 58.

celled as from the outbreak of the war. The Anglo-Turkish Mixed Arbitral Tribunal held in the case of *Sir W. J. Armstrong Whitworth & Co., Ltd. & Vickers Ltd.* (1928)—

> 'The extinction of the contractual nexus does not affect the pecuniary obligations resulting from acts performed before the extinction, as it should not result in the unjust enrichment of one of the parties to the detriment of the other. There is no reason to presume that the Treaty intended to set aside this fundamental principle, so much in conformity with the rules of equity. . . . We should therefore assume that it is the duty of the Tribunal to decide whether and to what extent the defendants have been enriched without cause at the expense of the claimant'.[59]

In *Leslie Caro* v. *Norddeutscher Lloyd* (1927), the Anglo-German Mixed Arbitral Tribunal upheld the same principle and stated—

> 'The application of this principle implied in the Treaty would not necessarily involve application of any detailed provision of a certain national law referring to i[u]njustified enrichment'.[60]

This view was, however, subsequently disputed by the same Tribunal in *Iraq Petroleum Co., Ltd.* v. *Deutsche Bank und Disconto Gesellschaft* (1929),[61] which followed the rule previously applied by it in *The Dunderland Iron Ore Co., Ltd.* v. *Fried. Krupp A.G.* (1926)[62] that 'this problem . . . has in general to be decided in each separate case in accordance with the provisions of the municipal law applicable'.[63] While the former view is shared by the Anglo-Turkish Mixed Arbitral Tribunal, the latter seems to be favoured by the Belgo-German

[59] 8 T.A.M., p. 996, at p. 1001. Transl. See also Belgo-German M.A.T.: *Didier* v. *Cohn et Pink* (1929), 8 T.A.M., p. 800, at p. 801; Anglo-German M.A.T.: *Burroughs Wellcome & Co.* v. *Chemische Fabrik auf Actien* (1926), 6 T.A.M., p. 13.

[60] 7 T.A.M., p. 398, at p. 399. See also *Didier Case* and *Burroughs Wellcome & Co. Case* cited in previous footnote.

[61] 9 T.A.M., p. 478, at p. 482.

[62] 6 T.A.M., p. 639, at p. 641.

[63] See also the same Tribunal in *Strauss v. Deutsche Bank* (1927), 7 T.A.M., p. 372; *Strauss* v. *Direction der Disconto Gesellschaft* (1927), *ibid.*, p. 375; *Fr. Meyer's Sohn Ltd.* v. *Conrad Meyer* (1927), *ibid.*, p. 379; *Oppenheimer* v. *Heirs of O. Lewy* (1927), *ibid.*, p. 418, 8 T.A.M., p. 283; *E. Sehmer* v. *Ehrhardt & Sehmer A.G.* (1928), 7 T.A.M., p. 493; *Birnbaum* v. *Birnbaum* (1928), 8 T.A.M., p. 7.

Mixed Arbitral Tribunal[64] and the Rumano-German Mixed Arbitral Tribunal.[65]

The Rumano-German Mixed Arbitral Tribunal, however, treated the doctrine of unjust enrichment as a problem of general jurisprudence and in *Direction générale des Ports et Voies de Communication par Eau* v. *A. Schwartz et Cie.* (1927) dealt at some length with the distinction between unjust enrichment *sensu stricto* and enrichment without cause. In this case, the Rumanian plaintiffs asked, *inter alia,* for the restitution, in gold marks or its equivalent, of a part payment made in respect of a contract which was subsequently disrupted by the war. The Tribunal held—

> 'The theory of enrichment of the Rumanian plaintiffs is based on a confusion between unjust enrichment and enrichment without cause. . . . The person who has received what is not due has committed a fault, at least a negligence: the obligation to restore—in certain cases—all that he has received, even though he may no longer be enriched of it at the time when he is formally called upon to do so, is the natural sanction of his fault, or of the negligence committed. The situation is, however, quite different when the enrichment is for a lawful cause, which has ceased to exist, without any fault on the part of the *accipiens.* In this case, there is no plausible reason for imposing on the latter a sanction which may even be ruinous for him: he is bound to restore only what remains of the enrichment'.[66]

Unjust enrichment *sensu stricto* is thus regarded as quasi-delictual, whilst enrichment without cause is looked upon as quasi-contractual. In the latter case, what ought to be restored is not, therefore, as the Tribunal said, 'the sum received, but a sum equivalent to the economic value of what in the present state of the defendant's fortune may be regarded as the proceeds of what had been paid him by the plaintiff'.[67] The determination of the exact amount of the enrichment in such cases may be

[64] *Delcroix* v. *Fritzche et Cie.* (1923), 3 T.A.M., p. 291, at p. 294; cf., however, *Didier Case* (1929), *loc. cit.*

[65] *Direction générale des Ports et Voies de Communication par Eau* v. *A. Schwartz et Cie.* (1927), 7 T.A.M., p. 738, at p. 745.

[66] *Ibid.,* at p. 742. Transl.

[67] *Ibid.,* at p. 743. Transl.

a matter of extreme complexity (this was not denied by the Tribunal which in fact had to appoint an expert to make an inquiry[68]); but the principle applied appears to be a real endeavour to achieve subjective justice by maintaining *suum cuique*. Substantially the same principle as that enunciated above appears to have been applied by the Belgo-German Mixed Arbitral Tribunal in *Delcroix* v. *Fritzche & Cie.* (1923),[69] which considered that the critical date for estimating the defendant's enrichment was the date when the action was introduced.[70] In *Arnold & Foster, Ltd.* v. *J. W. Erkens* (1926), the Anglo-German Mixed Arbitral Tribunal found that, as a result of the contract having been dissolved, the losses suffered by the defendant company in fact exceeded the part payment of 10 per cent made initially by the plaintiffs and therefore there was no duty to make any restitution.[71] In this, as well as in other cases, in view of Articles 296 and 299 of the Treaty of Versailles, the decisive date was regarded as that of the coming into force of the Peace Treaty which led to the formation of the Tribunal.[72]

The exact limits of the application of the doctrine of unjust enrichment and especially of enrichment without cause have perhaps not yet fully crystallised into concrete rules either in all municipal systems or in international law. But, as precedents show, it is found to be the *ratio legis* of many rules of positive international law and has itself received direct application in some cases, and there seems little doubt that its application is in accordance with substantive justice.

Indeed, this doctrine, together with the three other general principles of law already mentioned, form, it is submitted, an integral whole for putting into operation Ulpian's formula of justice: *Jus suum cuique tribuere,* by making each one bear the consequences of his own wrongs or negligence, by allowing every one to exercise his rights, by restoring to every one losses which he has unjustly suffered and by making every one return that which he has unjustly acquired. Justice is achieved, moreover,

[68] *Ibid.*, at pp. 746–747.
[69] 3 T.A.M., p. 291.
[70] *Ibid.*, at p. 295.
[71] 6 T.A.M., p. 606.
[72] *Ibid.*, at p. 608; *Davidson* v. *Dammann* (1926), 6 T.A.M., p. 588, at p. 590; *The Dunderland Iron Ore Co., Ltd.* v. *Krupp A.G.* (1926), *ibid.*, p. 639, at p. 641; *Meyer's Sohn Ltd.* v. *Conrad Meyer* (1927), 7 T.A.M., p. 379, at p. 383.

by holding a proper balance between the parties when, in accordance with general principles of law, international law forbids excesses in the carrying out of acts of legitimate self-defence and self-help, prohibits the abusive exercise of rights, safeguards the wrongdoer from liability for losses which he has not caused or from paying the same loss twice over, and limits the duty of returning any benefit received without cause to the actual enrichment.

The implementation of these important aspects of justice through the general principles of law recognised by civilised nations may indeed suggest the coincidence between justice and the operation of these principles as a whole. And, as the case of *Sir W. J. Armstrong Whitworth & Co., Ltd. & Vickers Ltd.* (1928) shows, in the application of these principles of law as well as of justice, one is often also applying principles of equity,[73] which shows once again the basic identity of the three notions, justice, law and equity.

## INTERNATIONAL EQUITY

While there is rarely any dispute that an international tribunal should administer justice—both World Courts, charged with the function of administering international law, being called Courts of International Justice—considerable differences of opinion exist as to the extent to which an international tribunal may have recourse to equity, which are probably due to the variations in the acceptation of the term equity.[74] Briefly, it may be said there are four types of equity: *ex aequo et bono,* absolute equity, equity for supplementing the law and equity in the exercise of judicial discretion.

[73] See text to note 59 above.

[74] Cf. *e.g.,* Bentwich and Others, *Justice and Equity in the International Sphere,* 1936; Berlia, *Essai sur la portée de la clause de jugement en équité en droit des gens,* 1937; Borel, 'La compétence du juge international en équité', 38 *Annuaire* (1934), p. 210; Habicht, *The Power of an International Judge to Give a Decision Ex Aequo et Bono,* 1935; Mouskhéli, 'L'équité en droit international moderne', 40 *R.G.D.I.P.* (1933), p. 347; Orfield, 'Equity as Concept of International Law', 18 *Kentucky L.J.* (1929–1930), pp. 31 and 116; Schwarzenberger, 'The Conception of Equity in International Law', in *The New Commonwealth Research Material,* 1934, No. 1; Schwarzenberger, *William Ladd: An Examination of an American Proposal for an International Equity Tribunal,* 1936; Strupp, 'Le droit du juge international de statuer selon l'équité', 33 *Recueil La Haye* (1930), p. 357.

*Ex Aequo et Bono*

Article 38 II of the Statute of the International Court provides that—

> 'This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto'.

Reasoning *a contrario* from paragraph I of this Article, which provides, without the mention of any express consent, that the Court shall decide disputes submitted to it by application of international law, the conclusion is inevitable that decisions *ex aequo et bono* do not necessarily coincide with decisions in accordance with international law. The history of Article 38 II provides no clue as to the exact meaning and function which the authors of the provision wished to attribute to it, except the desire expressed that there should be a provision permitting the Court to confirm settlements reached in the course of proceedings between the contesting parties.[75] However, as the World Court pointed out in the *Free Zones Case* (1930), 'a "judgment by consent" though not expressly provided for by the Statute, is in accordance with the spirit of that instrument'.[76] No express provision such as Article 38 II was, therefore, necessary to give the Court the power to give a judgment by consent, nor did the Court consider that Article 38 II expressly provided for such a contingency.

Neither the Permanent Court nor the International Court has had occasion to apply Article 38 II. The French judge *ad hoc*, Eugène Dreyfus, in his dissenting opinion in the *Free Zones Case*, expressed the view that the Court should have exercised the power to decide *ex aequo et bono*, by which he meant, the Court should 'play the part of an arbitrator in order to reach the solution which, in the light of present conditions, appeared to be the best, even if that solution required the abolition of the zones'.[77] The Court, however, held that: 'The Court, being a Court of justice, cannot disregard rights recognised by it, and base its decision on considerations of pure

[75] See League of Nations: *Documents concerning the Action taken by the Council of the League of Nations under Article 14 of the Covenant and the Adoption by the Assembly of the Statute of the Permanent Court.* Doc. No. V.1930.3, p. 145 *et seq.*; *op. cit.*, in note 5 above, p. 20.

[76] Order of December 6; A 24, p. 14.

[77] A/B 46, p. 212.

expediency'.[78] 'Such freedom, being contrary to the proper function of the Court, could, in any case, only be enjoyed by it if such freedom resulted from a clear and explicit provision which is not to be found in the Special Agreement'.[79]

Decisions *ex aequo et bono,* therefore, imply decisions based on practical considerations and expediency, disregarding, if necessary, existing law and recognised rights. They do not come within the normal function of courts of law or of justice, which should not take such decisions without the express consent of the parties.

*Absolute Equity*

More closely related to law and justice according to law than decisions *ex aequo et bono* are decisions according to absolute equity. In a number of arbitral treaties, international tribunals have been empowered to decide according to absolute equity. The German-Mexican Claims Commission (1925), in the case of *Testamentaria del Señor Hugo Bell,* said—

> 'Equity is, according to the definitions of the dictionaries and doctrinal writers, natural justice as contrasted with the letter of the law, the moderation of positive law having in mind more the intention of the legislator than the text, or rather, the predominance of conscience in the decision of a judge. A tribunal may "concede according to equity that which does not constitute an obligation and decide without subjection to the law"'.[80]

While decisions *ex aequo et bono* and decisions according to absolute equity share the same characteristic of being able to override existing law, the former disregard the law for the sake of expediency, whereas the latter disregard merely the letter of the law, and not its spirit. Equity moderates the rigour of the law in order the better to achieve justice by implementing the true intention of the legislator. It is the spirit of the law. Here Aristotle's well-known definition may be recalled—

> 'And this is the nature of the equitable, a correction of law where it is defective owing to its universality'.
>
> 'When the law speaks universally, then, and a case

[78] A 24, p. 15.
[79] A/B 46, p. 153.
[80] A. H. Feller, 'The German-Mexican Claims Commission' (1933) 27 *A.J.I.L.,* p. 62, at p. 65.

> arises on it which is not covered by the universal statement, then it is right, where the legislator fails us and has erred by oversimplicity, to correct the omission—to say what the legislator himself would have said had he been present, and would have put into his law if he had known'.[81]

It follows that an important role of equity is to disregard legal technicalities. An instructive example is the *Orinoco Steamship Co. Case* (1910). This case arose out of the cancellation by the Venezuelan authorities of a concession containing a Calvo Clause which had previously been granted to certain American citizens. The United States-Venezuelan Mixed Claims Commission (1903) had decided the claim partly in favour of the claimants.[82] The United States protested against this award and the parties agreed to submit the award to revision by the Permanent Court of Arbitration.

The Permanent Court of Arbitration found that, as the *compromis* of 1903 obliged the Commission to 'give their decisions on a basis of absolute equity without regard to objections of a technical nature, or to the provisions of local legislation', the former umpire, in dismissing the claim on account of the claimant's failure to exhaust local remedies, and his failure to notify the cession of the debt in accordance with local legislation, did not decide in accordance with absolute equity and, therefore, violated the *compromis*. That part of the award was annulled, while other parts were allowed to stand.[83]

The *Orinoco Steamship Co. Case* (1910), besides showing that equity implies the disregard of technicalities, also presents interest of a wider character in showing that the proper application of absolute equity is a fit subject for judicial consideration and review. Another example illustrating this meaning of absolute equity is the case of *Emrich Heny,* which considered that absolute equity permitted the Commission to disregard any technical deficiencies in a contract, including the failure to meet the requirement of publication required by local law.[84]

At the same time the *Heny Case* touched upon another

[81] *Nichomachean Ethics,* V, 10 (Transl. by Ross, 9 *Works,* Clarendon Press).

[82] 1 Scott, *Hague Court Reports* (hereinafter cited H.C.R.), p. 255.

[83] 1 H.C.R., p. 226. Cf. also Franco-Mexican Mixed Cl.Com. (1924): *Georges Pinson Case* (1928), *Jurisprudence de la Commission,* p. 1, at p. 26.

[84] U.S.-Ven. Mixed Cl.Com. (1903), *Ven.Arb. 1903,* p. 14, at p. 23.

important aspect of equity in affirming that 'equity demands that he should be indemnified who directly suffered the losses'.[85] The relation between justice and equity has been mentioned. Justice, as has been seen, seeks to implement the precept *Jus suum cuique tribuere*. Equity seeks to carry out justice in each individual case, by disregarding technicalities and by looking into the circumstances of the parties. It is also inspired by the same precept *Jus suum cuique tribuere*. Thus, corresponding to the principle just mentioned that he who actually suffers the losses shall be indemnified, the United States Court of Claims, in a case where United States officials detained the ships of the claimants in New York harbour for a considerable period of time, held—

> 'In equity and good conscience the United States should be held accountable to the plaintiff for the damage which undoubtedly accrued to the owners of the *Zeelandia* by virtue of her detention'.[86]

A person should thus be responsible for any loss which he causes another. But at the same time, as the Anglo-Turkish Mixed Arbitral Tribunal held in the case of *Sir W. J. Armstrong Whitworth & Co., Ltd. & Vickers Ltd.* (1928), it would be 'contrary to equity' to lay upon a person the burden of responsibility for acts which he has not committed.[87] The same case, as has already been pointed out, may also be adduced as illustrating the foundation of the doctrine of unjust enrichment upon the principles of equity.[88]

The third most important aspect of equity is the taking into account of the personal circumstances of the parties in order to bring about the true and desired result of the law. To illustrate this point one may cite those cases where the submission of a claim is allowed even though it is out of time because, for instance, the claimant has not been able to bring the case earlier

[85] U.S.-Ven. Mixed Cl.Com. (1903), *Ven.Arb. 1903*, p. 14 at p. 23.

[86] *Royal Holland Lloyd* v. *U.S.A.* (1931), 26 *A.J.I.L.* (1932), p. 399, at p. 416. See also Portugo-German Arbitration: *Angola Case* (1928, 1930): 'And, indeed, it would not be equitable to let the injured party bear those losses which the author of the initial illegal act has foreseen and perhaps even intended, for the sole reason that, in the chain of causation, there are some intermediate links . . .'. (2 UNRIAA, p. 1011, at p. 1031. Transl.)

[87] 8 T.A.M., p. 996, at p. 1001. See further *op. cit.*, in note 5 above, p. 208 *et seq.*

[88] See above text to note 59.

on account of ill-health.[89] The issue is also illustrated in the first *Pious Fund Case* decided by the Mexican-United States Claims Commission (1868). In this case, the umpire refused to award moratory interest on the interest of the capital. After having considered the legal aspects of the claim, he continued—

> 'The umpire further thinks that considering the troubles and difficulties to which Mexico and her Government have been subject for several years past it would not be generous nor even fair to punish them for their failure to pay interest upon a capital of the nature of the Pious Fund, so far as to insist upon the payment of interest upon that interest. As a matter therefore both of justice and equity the umpire thinks that this second interest ought not to be demanded'.[90]

Considerations of strict law fall therefore under the rubric of justice, while considerations of personal circumstances come under equity.

However, as the Franco-Venezuelan Mixed Claims Commission (1902) said in the *Maninat Case*—

> 'Generosity is not equity: equity has no part in generosity. Equity exists when exactly the right thing is done between the parties'.[91]

Similarly, the Franco-Mexican Mixed Claims Commission (1924) in the *Georges Pinson Case* (1928), dealing with claims arising out of revolutionary events in Mexico, said—

> 'True equity which ought to govern the decisions of this Commission can only consist in holding in equilibrium, as much as possible, the considerations of equity invoked by both sides'.[92]

Thus, also discussing the responsibility of States for losses caused by revolutions, the Italo-Venezuelan Mixed Claims Commission (1903) held in the *Salvatore Sambiaggio Case*—

> 'It is further urged that absolute equity should control the decisions of the Commission and that, equitably,

[89] See Rumano-German M.A.T.: *Bratu Case* (1929), 8 T.A.M., p. 905; Franco-German M.A.T.: *Hourcade Case* (1922), 1 T.A.M., p. 786, at pp. 786–787.

[90] 1 H.C.R., p. 48, at p. 53.

[91] Ralston's Report, p. 44, at p. 79.

[92] *Jurisprudence de la Commission*, p. 1, at p. 133. Transl. See also Rumano-German M.A.T.: *'Cristalul', S.A. Case* (1929), 9 T.A.M., p. 431, at p. 433 (Admission of claims out of time); Greco-Turk. M.A.T.: *Banque d'Orient Case* (1928), 7 T.A.M., p. 967, at p. 973 (Burden of proof).

> sufferers from the acts of the revolutionists should be compensated. But this subject may be viewed from two standpoints. It is as inequitable to charge a government for wrongs it never committed as it would be to deny rights to a claimant for a technical reason. In the view of the umpire, the true interpretation of the protocol requires the present tribunal, disregarding technicalities, to apply equitably to the various cases submitted the well-established principles of justice, not permitting sympathy nor suffering to bring about a disregard of law'.[93]

This balancing of the considerations of equity on both sides is well expressed by the maxim: 'Equity is equality'.[94]

The last point made by the umpire in the *Sambiaggio Case* is to be noted. Even in the application of absolute equity, the decision should basically be an implementation of the law and not a disregard of it. The same view was stated by the Franco-Venezuelan Mixed Claims Commission (1902) in the *Maninat Case* (1905)—

> 'To plant an equity always requires the basic quality of a right in the party receiving, because of a wrong moving from the party to be charged with the onerous conditions of the equitable conclusion. . . . To act at all, he [the umpire] must find a right to claim on the part of the claimant, and a wrong to be redressed on the part of the respondent Government. Within those circumscribed limits he has liberty of and necessity for action; outside of those limits he is a trespasser'.[95]

This reaffirms the fundamental link which has been pointed out between justice, law and equity.

*Equity Praeter Legem*

If this respect for the law is required in the application of

[93] *Ven.Arb. 1903*, p. 666, at p. 692.

[94] See above note 92. Cf. also Franco-Ven. Mixed Cl.Com. (1902): *Brun Case*, Ralston's Report, p. 5. The treaty provided that the awards should be paid in Venezuelan public loans. At the time of the decision, these loans having depreciated, it was asked of the Umpire that he should increase the award by a corresponding amount. He said: 'If he did not do this, he might cause serious inequity, by inequality, between the individual claims now before him; and if he did do this, he would preserve equity by equality, among the claimants directly before him, but he would work injustice and inequity, by inequality to every other holder of this diplomatic debt' (at p. 29).

[95] Ralston's Report, p. 44, at p. 79.

absolute equity, it is even more so when a tribunal is merely asked to apply equity at the same time as law. Article VII of the Jay Treaty (1794), which set up the Claims Commission between Great Britain and the United States, empowered the Commissioners to 'decide the claims in question according to the merits of the several cases, and to justice, equity and the laws of nations'. Commissioner Gore in his opinion in the case of the *Betsey* (1797) stated—

> 'Now, although it may be said that the law of nations is bottomed on equity, yet, from the parties superadding that term to the others, it is evident they meant to give a greater latitude to this quality than could be applied to it as entering into the composition and ground of this law'.[96]

This view is echoed in a decision of the British-United States Claims Arbitral Tribunal (1910) which was directed to decide 'in accordance with treaty rights and with the principles of international law and equity'.[97] The tribunal in the *Cayuga Indians Case* (1926) held—

> 'Something more than the strict law must be used in the grounds of decision of arbitral tribunals in certain cases; that there are cases in which—like courts of the land—these tribunals must find the grounds of the decision, must find the right and the law in general considerations of justice, equity, and right dealing guided by legal analogies and by the spirit and received principles of international law'.[98]

The application of considerations of equity in this case allowed the tribunal, in its own words, 'to look behind the legal person and consider the human individuals who were the real beneficiaries'.[99] The tribunal penetrated 'the corporate fiction' of the 'Cayuga Nation' with whom New York covenanted and sustained the claims of the individuals who were the descendants of that tribe.

Both the application of absolute equity and that of equity to supplement the law by an international tribunal require the consent of the parties. The exact line of demarcation between the two types of equity may not be a precise one. It would appear, however, that an international tribunal authorised to

[96] Moore, 4 *Int.Adj.* (M.S.), p. 179, at p. 223.
[97] Nielsen's Report, p. 5.
[98] *Ibid.*, p. 203, at pp. 314–315. See also Panamanian-U.S. Gen. Cl.Com. (1926): *Perry Case* (1933), Hunt's Report, p. 33, at p. 75.
[99] *Ibid.*, at pp. 314, 321.

apply absolute equity would have a greater latitude to disregard applicable rules of law than a tribunal merely authorised to apply equity in addition to law. Generally speaking, in cases where international tribunals have been authorised to apply absolute equity, the intention has been to limit the field of its application to specific rules, such as the rule concerning exhaustion of local remedies.[1] A general authorisation to apply absolute equity would be almost equivalent to an authorisation to decide *ex aequo et bono*. As a rule, however, international tribunals tend to interpret their power to apply absolute equity restrictively and prefer to base their decisions on legal considerations.[2]

*Equity Secundum Legem*

Lastly, with regard to equity in the exercise of judicial discretion. The application of this type of equity is inherent in the function of an international tribunal and no special authorisation is required. As the Chairman of the Advisory Committee of Jurists which drafted the Statute of the World Court said in a speech before the Second Meeting of the Committee—

> 'Although when there is a clear rule of positive law, the duty of him who is exercising jurisdiction is to apply it, equity, in international law as well as in all systems of municipal law, is the indispensable complement of positive law. For the judge who has the inescapable duty to decide, is often, by the force of things, made a minister of equity, charged with the duty of using the suggestions of his own conscience and of his reason in order to overcome the obscurities, insufficiency or silence of the positive law, and the many gaps and imperfections of the law of nations are not calculated to lessen the importance of this task'.[3]

It should be mentioned that it is not only when the law is obscure, insufficient or silent that the judge has to have recourse to equity. What is often overlooked is that the judge must also exercise his discretion with regard to questions of fact. In particular in the assessment of damages, where the principle of

[1] Franco-Mexican Mixed Cl.Com. (1924): *Georges Pinson Case* (1928), *Jurisprudence de la Commission*, p. 1, at p. 26.

[2] Cf. *ibid.*, p. 29: 'In my opinion, therefore, the part of equity in this arbitration, though very important, is nevertheless limited. . . . Generally speaking, the duty of the Commission is to examine the contested claims from the standpoint of international law' (Transl.).

[3] *Procès-verbaux*, p. 48. Transl.

liability has clearly been established, but the extent of the loss is not clear, the only recourse for an international judge often is to assess the damages in as equitable a manner as is possible under the circumstances. In all these spheres where the exercise of judicial discretion is required, international tribunals constantly have recourse to considerations of equity, so as to apply the law in accordance with justice and the spirit of the law.[4] As Judge Hudson pointed out in his dissenting opinion in the *Meuse Case* (1937)—

> 'What are widely known as principles of equity have long been considered to constitute a part of international law and as such they have often been applied by international tribunals'.[5]

As to the formal authority for the application of equity in international law, he said—

> 'Article 38 of the Statute expressly directs the application of "general principles of law recognised by civilised nations" and in more than one nation principles of equity have an established place in the legal system'.[6]

Indeed, as Vinogradoff said, 'Equity as a method of judicial discretion is inseparable from a complex and efficient system of law'.[7] Once again, the unity of the concepts of justice, law and equity is asserted.

Indeed, whether an international tribunal administers equity as an integral part of international law or is authorised to apply absolute equity or equity to supplement the law, its tasks remain essentially judicial, and its decisions remain based upon respect for the law and legal rights.[8] Equity is not used to usurp the function of law, but to ensure its proper operation in accordance with the principles of justice. International law, in its operation, seeks to implement the idea of justice, at least formal justice, in the international sphere, whilst equity assists it to achieve subjective justice in individual cases. They are the twin instruments whereby international justice is realised in the international sphere.

[4] Cf. *op. cit.*, in note 5 above, p. 239.
[5] A/B 70, p. 76.
[6] *Ibid.* Cf. *op. cit.* in note 5 above, Appendix 2, p. 400 *et seq.*
[7] *Common-Sense in Law*, 1943, p. 232.
[8] Cf. J. B. Moore, 'Peace, Law, Hysteria', 7 *Collected Papers*, p. 220, at p. 328. Speaking of provisions in arbitral treaties which authorised the tribunal to apply equity, 'The foregoing stipulations were uniformly interpreted as meaning that the law should be applied in a fair and liberal spirit, and not as meaning that the arbitrators were authorised to make improper compromises or extra-legal arrangements'.

# 12

# THE STANDARD OF CIVILISATION IN INTERNATIONAL LAW

GEORG SCHWARZENBERGER

THE nexus between Civilisation and International Law is a basic question of International Law. At the same time, it may claim to be a current legal problem of the first order.

The barbarities committed by the totalitarian aggressors of the Second World War and the intensified use of weapons of mass destruction in the concluding stages of that war raised in a pointed form the double challenge to civilisation held out by totalitarian systems of government and three-dimensional war. The advent of the hydrogen bomb forces us to face a still grimmer issue: the compatibility of nuclear warfare with the survival of animate life on our planet.

Admittedly, measured optimism is not wanting on the outer fringes of the councils of the nations. It appears, however, wiser to rely on the insight of scholars and experts in closer contact with these vital realities of the nuclear age. Thus, Bertrand Russell sums up his evaluation of the available evidence in a sombre warning: 'I have not found that the views of experts on this question depend in any degree upon their politics or prejudices. They depend only, so far as my researches have revealed, upon the extent of the particular expert's knowledge. I have found that the men who know most are most gloomy'.[1]

Since this forecast, the Government in the United Kingdom has taken the decision to participate in the hydrogen bomb race, and the *Statement on Defence, 1955* puts the fateful alternative in the following words: 'The conscience of civilised nations must

[1] 'Man's Peril from the Hydrogen Bomb' (1954) 52 *The Listener*, p. 1136. Cf. *ibid.*, p. 1135, for the views of Lord Adrian, Air Chief Marshal Sir Philip Joubert, and Sir John Slessor; J. D. Cockcroft and others, *Atomic Energy: Its International Implications*, 1948, p. 91 *et seq.*; Sir Philip Joubert, 'The Hydrogen Bomb: The Impact on Military Strategy' (1954) 52 *The Listener*, p. 954; Lord Cherwell's Messel Memorial Lecture, *The Times* newspaper, July 15, 1954, and Sir Winston Churchill's speech in the House of Commons (*Hansard*, March 1, 1955, Vol. 537, col. 1897 *et seq.*).

naturally recoil from the prospect of using nuclear weapons. Nevertheless, in the last resort, most of us must feel that determination to face the threat of physical devastation, even on the immense scale which must now be foreseen, is manifestly preferable to militant Communism, with the national and individual humiliation that this would inevitably bring. Moreover, such a show of weakness or hesitation to use all means of defence at our disposal would not reduce the risk. All history proves the contrary'.

Only a part of this paper will be concerned with these disturbing aspects of contemporary world affairs. There are also more strictly academic reasons why this topic should be regarded as a current legal problem. This paper is closely linked with others in this volume which are meant to be a joint contribution to an international discussion envisaged by the International Committee of Comparative Law on General Principles of Law recognised by Civilised Nations.[2] Irrespective of whether the contemplated world conference on this timely subject will ever materialise, international and comparative lawyers can do worse than pay renewed attention to this source of international law, for the scope and potentialities of the reserve powers provided by Article 38 of the Statute of the World Court appear to require a considerable amount of further research.[3]

The selection of this topic has also been influenced by a sense of obligation to make yet another effort at a rationally verifiable discussion between international lawyers in the United Kingdom on the value of the sociological approach to international law. In the University of London, the matter has been brought to a happy conclusion some years back by the introduction of Sociology of International Law as a teaching and examination subject. There are also refreshing signs abroad that this new branch is increasingly recognised as the missing link between the academic disciplines of International Law and Relations.[4] It

2 Cf. 5 *International Social Science Bulletin* (1953), p. 850.

3 Cf. B. Cheng, *General Principles of Law as applied by International Courts and Tribunals*, 1953, pp. xi–xii.

4 Encouraging recent evidence of this trend are works such as M. S. McDougal, *International Law, Power and Policy, Hague Recueil*, 1953; J. Stone, *Legal Controls of International Conflict*, 1954, and Ch. de Visscher, *Théories et Réalités en Droit International Public*, 1953. Cf. also Sir Gerald Fitzmaurice's significant review of Professor Stone's above-mentioned book, 1 *Sydney Law Review* (1954), p. 332 *et seq.*

would, however, be idle to assume that, outside the University of London, this development has been viewed in all quarters concerned with enthusiastic approval. In the long run, however, even those who still doubt cannot want the study of international law in this country to sink to a parochial level. It is, therefore, assumed that the present dissension on acceptable methods in the study of international law is still capable of a constructive solution on a basis in keeping with the traditions of academic freedom and tolerance.

In this case for one, it would be lacking in necessary frankness to be content with the claim that the sociological approach to international law is merely supplementary to the analytical and systematic treatment of the relevant material. On the contrary, in this instance—and there are others of the same kind—the sociological approach alone enables the analytical lawyer to fulfil adequately his particular function.

Even the legal purist will admit that any question of treaty interpretation is within his province. Let him then construe paragraph c of section 1 of Article 38 of the Statute of the World Court, which charges the International Court of Justice to apply, *inter alia,* 'the general principles of law recognised by civilised nations'. In performing his traditional task, the analytical lawyer can hardly avoid asking himself what is the meaning of the term 'civilised nations', for the World Court may apply only such general principles of law as are recognised by nations within this category.

In proceeding with professional self-confidence on this well-trodden path, the analytical lawyer will do well to keep before him four uncontroversial canons of treaty interpretation.[5] First, when a text is clear, no question of interpretation arises.[6] Secondly, if interpretation is called for, the ordinary and natural meaning of the term has to be ascertained.[7] Thirdly, unless absolutely unavoidable, no word or part of a clause must be treated as superfluous.[8] Fourthly, so long as it is possible to

[5] See further the writer's *International Law,* Vol. 1, 1949, p. 208 *et seq.*

[6] Advisory Opinion of the Permanent Court of International Justice in the case of *Acquisition of Polish Nationality* (1923), Series B, No. 7, p. 20.

[7] Advisory Opinion of the International Court of Justice on 'Admission to the United Nations', *I.C.J. Reports 1950,* p. 8. Cf. also the Advisory Opinion on 'Art. 4 of the Charter of the United Nations', *I.C.J. Reports 1947–1948,* p. 63.

[8] Separate Opinion of Judge Anzilotti in the *Lighthouses Case* (1934), Series A/B, No. 62, p. 31.

give an ordinary or natural meaning to a term, it is neither necessary nor permissible to have recourse to the preparatory material unless for the purpose of confirming the result of the interpretation of the text in the light of the ordinary meaning of the term.[9]

For generations, terms such as civilisation and civilised nations have occupied the minds of historians, philosophers and sociologists. Often, without being consciously aware of it, and long before Sociology became a distinct academic discipline, scholars have instinctively applied sociological techniques. Thus, whether he likes it or not, the analytical lawyer is in a dilemma. He may be content, as a number of writers on the general principles of law recognised by civilised nations have been, to refrain from expressing himself on the meaning of this embarrassing adjective. He then purchases legal purity at the price of forsaking the tenets of his own analytical method. He may also, consciously or, more often, subconsciously, apply his own *ad hoc* sociology. The adequacy of such an interpretation then depends on the width and depth of his individual knowledge. Yet it can hardly be said that this way of proceeding is reliable scholarship. A third, and more satisfactory, possibility exists. The international lawyer may realise in a becoming spirit of awareness of the interdependence of all learning that, at this stage, he has to equip himself with new and more congenial tools or at least that he has to accept gratefully the labours of others who, better fitted than he, have done the spade work for him.

Thus, in exploring the relation between Civilisation and International Law, we shall be happy to travel in the company of any analytical international lawyer who is prepared to accept a modicum of methodical elasticity in the interest of good scholarship.

## I. THE MEANING OF CIVILISATION

A group is frequently called civilised if it has acquired a mature apparatus of thought and action and is characterised by the extensive use of rational behaviour patterns.[10] It may be thought

[9] Cf. *loc. cit.* in note 5 above, pp. 217–218 and, on the genesis of Art. 38 of the Statute of the World Court, *loc. cit.* in note 3 above, p. 6 *et seq.*

[10] Cf. for instance, John Stuart Mill, *Civilisation* in *Dissertations and Discussions,* 1875, Vol. 1, p. 160 *et seq.*; L. Oppenheim (ed.), *The Collected Papers of John Westlake on Public International Law,* 1914, p. 139; W. A. Robson, *Civilisation and the Growth of Law,* 1935, p. 15, or Qu. Wright, *A Study of War,* 1942, Vol. 1, p. 152.

that terms such as 'civilised country', 'civilised system of law', 'civilised community' or other synonyms in *dicta* of English and United States courts,[11] or 'advanced nations' in Article 22 of the Covenant of the League of Nations bear this meaning. Civilisation in this sense implies a contrast with groups of a rationally less calculable character. Emphasis on reason and organisation is certainly one of the distinctive features of civilised life. Any definition of civilisation which relies on this as the only or decisive criterion remains, however, on a somewhat formal level. It does not appear to convey the full meaning of the term.

It will assist in our further analysis if, from the outset, a distinction is made between the two main aspects of civilisation. It affects the relation of man to nature and of man to man.[12] In the main, we shall only be concerned with this second facet of civilisation and may leave it to Equity lawyers whether a school which does not provide hot-water baths for its pupils should be considered a barbarous place.[13]

We shall gain further insight into the nature of civilisation by awareness of the plurality and multiplicity of this phenomenon. In our time when we have the works of Spengler,[14] Toynbee[15] and Alfred Weber[16] at our elbow, this aspect of the matter hardly requires further explanation. It is, however, of real relevance for our purposes. Already in his Essay on

[11] See, for instance, *Re Don's Estate* (1857), 4 Drew. 194 at 197 (*per* Sir Richard Kindersley, V.C.); *Simonin* v. *Mallac* (1860) 2 Sw. & Tr. 67; *Cammell* v. *Sewell* (1860) 5 H. & N. 728; *Brook* v. *Brook* (1861) 9 H.L.C. 193 at 212 (*per* Lord Campbell); *Lloyd* v. *Guibert* (1865) L.R. 1 Q.B. 115; *Udny* v. *Udny* (1869) L.R. 1 Sc. & Div. 441 (*per* Lord Westbury); *R.* v. *Keyn* (1876) L.R. 2 Ex.D. 63; *Re Queensland Mercantile and Agency Ltd.* [1892] 1 Ch. 219 at 226 (*per* Lindley, L.J.); *West Rand Central Gold Mining Co., Ltd.* v. *R.* [1905] 2 K.B. 391 at 407 (*per* Lord Alverstone, C.J.); *Fibrosa Case* [1943] A.C. 32 at 61 (*per* Lord Wright); *Bendall* v. *McWhirter* [1952] 1 All E.R. 1307 at 1315 (*per* Denning, L.J.); *R.* v. *Secker & Warburg* [1954] 2 All E.R. 683 at 685 (*per* Stable, J.); *Bambgbose* v. *Daniel* [1954] 3 All E.R. 263 at 267 (*per* Lord Keith); *The Paquete Habana* (1900) 175 U.S. 677; *Louis Dreyfus* v. *Paterson Steamships Ltd.* (1930) 43 F. (2d) 824 (*per* Judge Learned Hand).

[12] See further R. G. Collingwood, *The New Leviathan*, 1942, p. 291.

[13] *Re Geere's Will Trusts, The Times* newspaper, May 18, 1954.

[14] *Der Untergang des Abendlandes*, 1918 and 1922. For pertinent criticism of Spengler's naturalist conception of civilisation, cf. R. Niebuhr, *The Nature and Destiny of Man*, 1943, Vol. 2, p. 313.

[15] *A Study of History*, 1933–1954; *Civilisation on Trial*, 1948.

[16] *Kulturgeschichte als Kultursoziologie*, 1935. Cf. also N. Elias, *Über den Prozess der Civilisation*, 1939, (2 vols.).

*Caniballes* (1580),[17] Montaigne warned his readers against calling barbarous or savage that 'which is not common to them'. Awareness of the multitude of civilisations, their co-existence and impact on each other will assist in avoiding the fallacy of egocentricity and naïve identification of any particular civilisation with Civilisation as such.

A further element which is characteristic of civilisation is its constitutional fragility and relativity. It never is more than at the most an approximation to an ideal. In Jaquetta Hawkes' telling words,[18] it is 'like a skin of ice above bottomless waters'. At its highest, it is an ever continuing, but always precarious, effort. It may rightly be contended that this deficiency is not one peculiar to civilisation, but is inherent in any human effort.[19] It is, however, advisable to stress this point. Too often, the relativity of every civilisation and the elements of barbarism in it[20] are ignored and states of civilisation and non-civilisation contrasted as if they were absolutes. In Toynbee's apt terminology,[21] civilisation is a movement and not a condition. It is a voyage and not a harbour.

Even when we are aware of the preponderance of the rational and organisational elements in civilisation, of the multiplicity of civilisations and of the relativity of their achievements, we are still on the fringes of the problem. We shall not grasp the elusive essence of civilisation until we ignore the unimportant trappings of material advance which are incidentals of any civilising process and realise that the ultimate basis of any civilisation is religious and ethical.[22] It is this flame of the spirit which gives its impetus and driving power to civilisation as a historical process.

As with the functions fulfilled by Law and Morality,[23] it is possible to be still more specific regarding this spiritual

[17] Transl. by J. Florio (ed. H. Morley), 1886, p. 94.
[18] *Man on Earth*, 1954, p. 149.
[19] Cf. for instance, N. Berdyaev, *Slavery and Freedom*, 1948, p. 117 *et seq.*
[20] Cf. for instance, the facts in *Gregson* v. *Gilbert* (1783) 3 Dougl. 232, or the observations of Story, J., in *U.S.* v. *The Schooner La Jeune Eugenie* (1822) 2 Mason's Reports 409 at 446, on the change in the attitude of 'enlightened and civilised nations' to slavery.
[21] Cf. for instance, *loc. cit.* in note 15 above, 1948, p. 55.
[22] See further A. Schweitzer, *The Philosophy of Civilisation*, 1929–1932, and *ibid.*, Part 1, 1932, pp. 38–39, on the misleading antithesis of civilisation and *Kultur*.
[23] Cf. the writer's 'The Three Types of Law' (1949) 2 *Current Legal Problems*, p. 103 *et seq.*, and *Power Politics*, 1951, pp. 12 *et seq.* and 203 *et seq.*

kernel of civilisation if we make use of the basic sociological distinction between the pure or ideal types of community and society.[24] In relation to nature, civilisation means intelligent exploitation. In the relations between men, the position is reversed. Human association is the more civilised the less it has to rely on the exploitation of man by man or of one group by another, and the more it is based on the principles of agreement and voluntary co-operation. Exploitation is ultimately based on force. No human group has yet succeeded in dispensing altogether with coercion. It appears, however, a safe test of civilisation to measure its achievement by the degree to which it is able to dispense with this crudest of all driving forces and replace it by reliance on the principles of reciprocity and voluntary co-ordination of effort. In other words, the less it has a society character and the more it approximates to the pure state of a community,[25] the more any individual civilisation approximates to civilisation in the full sense of the word.

Once civilisation is related to the basic types of human association, it is no longer necessary to be content with the mere enumeration and description of a bewildering number of civilisations. It is then possible to evaluate and to measure individual civilisations in the light of a universally applicable test of the degree of civilisation which any such particular endeavour has attained.[26] This criterion gives the key to understanding whether, and to what extent, democratic States may claim to be more civilised than totalitarian or authoritarian systems; why it is useful to distinguish between groups which are called savage, because they have not yet reached any appreciable stage of civilisation, and groups which may be termed barbarian because

[24] As these terms, and the functions of pure or ideal types, have been fully explained elsewhere (cf. *loc. cit.* in note 23 above) it would be redundant to repeat this exposition here.

[25] See further *loc. cit.* in note 12 above, p. 326, and *loc. cit.* in note 23 above, 1949, pp. 109–110.

[26] It is implied in these statements that human relations based on agreement are superior to those based on force or coercion of a less visible character. The ultimate justification why the degree of civilisation attained at any time or place should be linked with the acknowledgment of the absolute value of human beings and the refusal to treat them merely as means to worldly ends can only be metaphysical. Thus, any one dissenting from this assumption which, in the last resort, is unverifiable, is fully entitled to reject this test. See further on the conditions on which value-judgments may legitimately be used in research work *loc. cit.* in note 23 above, 1951, p. 22.

they have forsaken civilisation.[27] More important still, groups whose members, in their *inter se* relations, may claim to be civilised may base their relations with other groups on different standards, or, whether they like it or not, be engulfed in an overriding society nexus which imposes severe limitations on the best of intentions. Then even the paradox of civilised States advancing to barbarism on the high road to co-extermination becomes explicable, although not necessarily more attractive.

## II. THE COALESCENCE OF INTERNATIONAL LAW AND CIVILISATION

The existence of law[28] in savage and barbarous groups, in the Trobriand Islands[29] no less than in the Third *Reich*,[30] indicates that law and civilisation are not inseparable companions. Law can exist without civilisation. It is, however, hard to imagine civilisation without law, especially a civilisation which aims at the attainment of community standards in the relations between its members.[31]

This proposition applies as much to international law as to municipal law. International law is possible whenever two parties recognise each other as equal in status and neither of them recognises a third party as its superior; they desire to treat each other on the footing of law and consider themselves bound by their mutual obligations. Historical evidence bears out that international law on the basis of such an ethical minimum is more than a mere hypothesis. Relations on the footing of international law have actually existed over prolonged periods between savage and barbarous groups.[32]

None the less, it is true that, under the triple influence of

[27] See further Collingwood, *loc. cit.* in note 12 above, p. 342 *et seq.*

[28] On the definition of law underlying this paper, cf. *loc. cit.* in note 23 above, 1949, p. 105 *et seq.*

[29] The object of one of Malinowski's suggestive field studies (cf. *Crime and Custom in Savage Society*, 1932). Cf. also A. S. Diamond, *Primitive Law*, 1935, and W. Seagle, *The Quest for Law*, 1941, p. 27 *et seq.*

[30] If evidence were required for the retrogression from civilisation to barbarism in the Third *Reich*, it would suffice to refer to G. Reitlinger, *The Final Solution*, 1953.

[31] See further *loc. cit.* in note 12 above, p. 327 *et seq.* Cf. also J. Stone, *The Province and Function of Law*, 1947, p. 331 *et seq.*

[32] Cf. the literature mentioned in the writer's 'International Law in Early English Practice' (1948) 25 *British Year Book of International Law*, p. 52, n. 2, and R. Numelin, *The Beginnings of Diplomacy*, 1950, pp. 238 and 242.

Christianity, chivalry and trade, the harshness of early medieval international law was considerably mitigated.[33] It underwent a civilising process of some magnitude. In its turn, it came to fulfil the function of an additional guardian of the values cherished by the Christian civilisation of Europe. However precarious the observance of medieval international law was, it incorporated an appreciable minimum of the values cherished by the members of this *una Christiana res publica.*

Under the triple impact of the disintegration of the European community of nations, the expansion of the European society into a world society and the ever continuing process of the concentration of political and economic power, the coalescence of international law and European civilisation began to show visible signs of strain.[34] The price which the European law of nations had to pay for universality was increasing separation from its Christian foundation and dilution of its ethical contents. It underwent a process of formalisation and became a law congenial to the needs of the industrial pioneer and capitalist investor.

The test whether a State was civilised and, thus, entitled to full recognition as an international personality was, as a rule, merely whether its government was sufficiently stable to undertake binding commitments under international law and whether it was able and willing to protect adequately the life, liberty and property of foreigners. In a multitude of treaties these minimum standards were codified in meticulous detail and gradually developed into rules of international customary law.[35] At the same time, the distinction between civilised and non-civilised communities served less disinterested purposes of Western imperialism and colonialism whenever it was opportune to treat communities on the fringes of the expanding Western world on a footing other than that of sovereign States.[36]

[33] Cf. R. Ward, *The Foundation and History of the Law of Nations in Europe,* 1795, Vol. 2, and *loc. cit.* in note 32 above, 1948, p. 52 *et seq.*

[34] For more detailed analyses, cf. *loc. cit.* in note 23 above, 1951, p. 25 *et seq.*, and the writer's 'The Rule of Law and the Disintegration of the International Society' (1939) 33 *American Journal of International Law,* p. 56 *et seq.*

[35] Cf. *loc. cit.* in note 5 above, p. 98 *et seq.*

[36] See *loc. cit.* in note 5, pp. 37–38 and in note 23 above, 1951, pp. 205–206. Cf. also John Stuart Mill, 'A Few Words on Non-Intervention' in *Dissertations and Discussions,* Vol. 3, 1875, p. 152 et seq. One sample must suffice: 'To characterise any conduct whatever towards a bar-

On a number of occasions, Christian conscience, allied with a powerful radical and rationalist humanitarian movement, asserted itself. Notable examples are the British lead in the international abolition of the slave trade[37] and the more complex instances of intervention, sometimes humanitarian and sometimes so misnamed.[38]

The corresponding trend in the humanisation of the laws of war has often been traced. What is less known is how little, within medieval Christendom, obligations of Christian ethics and chivalry counted in warfare against heretics[39] and in the hostile contacts between the Christian crusaders and the Saracens.[40] Still less restraint was shown in the course of the oversea expansion of European powers down to the nineteenth century.[41]

Nevertheless the revulsion against the unlimited character of seventeenth century warfare, the rational strategy of eighteenth century military thinking and the formation of professional armies

barous people as a violation of the law of nations, only shows that he who so speaks has never considered the subject' (p. 168). More tolerant voices were not, however, lacking. Cf. *The Hurtige Hane* (1801) 3 C.Rob. 324; *The Madonna del Burso* (1802) 4 C.Rob. 169; Sir Robert Phillimore, *Commentaries upon International Law*, 1879, Vol. 1, p. 22 *et seq.*, and H. A. Smith, *Great Britain and the Law of Nations*, 1932, Vol. 1, p. 14 *et seq.*

37 See further the present writer's 'The Protection of Human Rights in British State Practice' (1948) 1 *Current Legal Problems*, pp. 157–158, and Ch. Lloyd, *The Navy and the Slave Trade*, 1949.

38 Cf. *loc. cit.* in note 37 above, 1948, pp. 163–166, and H. Bülck, *Die Zwangsarbeit im Völkerrecht*, 1953, p. 28 *et seq.* On the reserved attitude of Lord Salisbury towards humanitarian intervention, cf. the note by Sir P. Currie of May 19, 1891, and the draft circular letter on British Protected Persons of July, 1891 (F.O. 83/1723).

39 See, for instance, on the sack of Béziers in 1209 in the war against the Albingenses, a letter of the Papal Legate to Pope Innocent III (*Innocent III. epist.*, 1682, Vol. 2, p. 373 *et seq.*): '*capta est civitas Bitterensis, nostrique non parcentes ordini, sexui vel aetati, fere viginti milia hominum in ore gladii peremerunt . . . spoliata est tota civitas succensa*'. Still more illuminating is another contemporary account of the same event in Caesarius Heisterbacensis's *Dialogus Miraculorum (Distinctio V, cap.* 21): '*Cognoscentes ex confessionibus illorum Catholicos cum haereticis esse permixtos, dixerunt abbati: Quid faciemus, domine? Non possumus discernere inter bonos et malos. Timens tam abbas quam reliqui, ne tantum timore mortis se catholicos simularent, et post ipsorum abcessum iterum ad perfidiam redirent, fertur dixisse: Caedite eos; novit enim dominus qui sunt eius*'.

40 Cf. Ward, *loc. cit.* in note 33 above, Vol. 2, pp. 81 *et seq.* and 362 *et seq.*, and S. Runciman, *A History of the Crusades*, 1951–1954 (3 volumes).

41 See, for instance, L. Curtis, *The Commonwealth of Nations*, 1916, Vol. 1, p. 131 *et seq.*, or F. J. P. Veale, *Advance to Barbarism*, 1953, p. 85 *et seq.*

assisted in encouraging the idea that war could be reduced to a game that would be played in accordance with fixed rules or, at least, to a method of civilised if violent settlement of international conflicts. This movement suffered a serious setback in the course of the Napoleonic Wars when the warfare of the French mass *levées* provided the first forebodings of the effects of emotion-laden nationalism on the precarious restraints which, in the preceding century, had been imposed on the god of war. Yet, in the post-1815 era it appeared as if progress were again on the march. A relatively stable system of balance of power, the unchallenged rule of the British Navy on the world's seven seas and the paternal eye kept by an all-powerful City of London on countries in need of British capital investment permitted war to be regarded as a remote contingency and made possible further humanising efforts by way of multilateral conventions, which culminated in the work of the Hague Conferences of 1899 and 1907.

The results attained, and their limitations, may be summed up in the words of the British *Manual of Military Law*[42]: 'The development of the laws and usages of war is determined by three principles. There is firstly, the principle that a belligerent is justified in applying any amount and any kind of force which is necessary for the purpose of war: that is, the complete submission of the enemy at the earliest possible moment with the least possible expenditure of men and money. There is, secondly, the principle of humanity which says that all such kinds and degrees of violence as are not necessary for the purpose of war are not permitted to a belligerent. And there is, thirdly, the principle of chivalry, which demands a certain amount of fairness in offence and defence, and a certain mutual respect between the opposing forces'.

Thus, the generation of pre-1914 international lawyers was fully justified in regarding international law as a powerful civilising agency and, in a spirit of self-assured optimism, they could point to undeniable evidence of a far-reaching incorporation of the minimum standards of Western civilisation in the international law of peace and war.

[42] *Amendments* (*No. 12*), 1929, pp. 2–3.

### III. THE STANDARD OF CIVILISATION IN CURRENT INTERNATIONAL LAW

In order to present a balanced picture, it is advisable to put proper emphasis on the advances made since the First World War in a number of relevant fields.

It should not be denied that, on the whole, the minorities treaties of the post-1919 period were a valuable complement[43] to the traditional minimum standards of international law in favour of foreign nationals. On the other hand, this statement must be qualified by the observation that, with few exceptions,[44] States in the post-1945 period refused to undertake any comparable commitments of a legal character. It is true, they freely professed their adherence to the Universal Declaration of Human Rights. It has also been avowed that now that the individual as such is duly protected, the need for the protection of minorities has passed. Yet, at the very moment when the General Assembly accepted the Declaration with enthusiastic applause, speaker after speaker carefully added his *caveat* on the merely moral character of this new *Magna Carta*.[45] Similarly, the establishment of mandates and trust territories has imposed some international restraints which may be listed on the credit side of the balance sheet.[46] In this context, a representative collection of multilateral treaties, ranging from assistance to refugees *via* the suppression of traffic in women and children to the protection of wild birds and plants[47] deserves to be noted. The *International Labour Code, 1951*,[48] although still least implemented by those members of the International Labour Organisation most in need of living up to the standards proclaimed in this 'code',

[43] See further *loc. cit.* in note 5 above, p. 121 *et seq.*; *loc. cit.* in note 23 above, p. 617 *et seq.*, and J. Robinson and others, *Were the Minorities Treaties a Failure?* 1943.

[44] Cf., for instance, the Delhi Pact between India and Pakistan of April 18, 1950. See further *loc. cit.* in note 23 above, p. 637.

[45] See further *ibid.*, p. 633 *et seq.* On the equally symptomatic Genocide Convention of 1948 cf. the writer's 'The Problem of an International Criminal Law' (1950) 3 *Current Legal Problems*, p. 291 *et seq.*, and the Advisory Opinion of the International Court of Justice on 'Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide' (1951), *I.C.J. Reports 1951*, p. 20 *et seq.* Cf. also the revealing Report of the *ad hoc* I.L.O. Committee on *Forced Labour*, 1953, and Bülck, *loc. cit.* in note 38 above.

[46] See further *loc. cit.* in note 23 above, 1951, p. 648 *et seq.*

[47] Cf. M. O. Hudson, *International Legislation, 1919–1945* and Oppenheim's *International Law*, 1952, Vol. 1, Appendix A, p. 882 *et seq.*

[48] Published by the International Labour Office in 1952.

should also be remembered. Moreover, other specialised agencies of the United Nations and regional organisations do much constructive work in direct furtherance of worthy objects of civilisation.[49]

The decisive point is not, however, the progress made, and the integration attained, on either side of a divided world. Where we part company with the 'idealist' school of international law and relations is just at this point, where it persists in ignoring or minimising the significance of the East-West rift; for this is the basic cleavage of our age.[50] In a bipolarised world, it is a relatively small matter whether, for instance, countries such as the United Kingdom and those of Western Europe recognise the standard of civilisation in their relations with each other or succeed in intensifying this relationship by in themselves highly beneficial treaties. What is vital is whether in the relations between the United States and the Soviet Union, or between partners, allies or satellites on the two opposite sides of the world fence, the standard of civilisation maintains its traditional place or is in danger of vanishing.

Within the compass of this paper, it must suffice to explore this problem in relation to three basic issues: Recognition, the General Principles of Law Recognised by Civilised Nations, and the Law of War.

*Recognition.* In the classical period between 1815 and 1914, State practice regarded the recognition of new States, and still more so that of new governments, as a matter within the exclusive discretion of every State. At the same time, the governments of the United States and Great Britain in particular used their freedom of action to obtain express guarantees that States and governments in quest of recognition would live up to their international obligations and, in particular, to the standards of civilised

[49] '*Dans le champ du droit positif, c'est en elles (les institutions internationales) que se dessinent le plus visiblement les tendances de l'évolution*' (M. Bourquin, '*L'Humanisation du droit des gens*' in *La Technique et les Principes du Droit Public*, 1950, Vol. 1, p. 21, at p. 54). For a more sceptical view of the functions fulfilled by international institutions, cf. *loc. cit.* in note 23 above, p. 232 *et seq.*

[50] Cf. *loc. cit.* in note 23 above, p. 398 *et seq.*, and the present writer's 'The Impact of the East-West Rift on International Law' (1951) *Grotius Transactions for 1950* (Vol. 36), p. 229 *et seq.* See also Sir Winston Churchill's speech in the House of Commons, *loc. cit.* in note 1 above, col. 1897.

communities in the attenuated meaning then attributed to the term.[51]

During the inter-war period, discretion was exercised as of old. It would, however, no longer have been true to hold that compliance with the standard of civilisation was any longer an essential condition of recognition. Although, for a prolonged period, some States held back on somewhat mixed grounds over the granting of recognition to the Soviet government,[52] the United Kingdom granted it recognition as the *de facto* government of Russia as early as 1921 and *de jure* recognition in 1924. In *Luther* v. *Sagor,* the Court of Appeal even bestowed on it the gratuitous designation of being a 'civilised country'.[53] Scrutton, L.J., however, at least absolved his own conscience and squarely placed the responsibility where it belonged: 'This immunity follows from recognition as a sovereign State. Should there be any government which appropriates other people's property without compensation, the remedy appears to be to refuse to recognise it as a sovereign State'.[54]

When the Fascist regime was installed in Italy, it did not appear to have occurred to other governments that to establish diplomatic relations with it involved at least the question whether such totalitarianism within the very core of the Western world was compatible with the minimum standards of a civilised State. By way of mitigating circumstances, the statesmen of that period could at least plead that, in the beginning, they did not realise the full implications of Fascism. Yet when, subsequently, Fascism revealed its true nature beyond any possibility of doubt, nothing was farther from the minds of the governments of the inter-war period than to contemplate the withdrawal of recognition from this regime. It was, therefore, not surprising that the government of the Third *Reich* should have been treated on the same footing as that of any other State. Similar to the develop-

[51] Cf. text to note 35 above. On British practice during the relevant period, cf. Smith, *loc. cit.* in note 36 above, p. 77 *et seq.*; *loc. cit.* in note 37 above, 1948, p. 159 *et seq.*; the present writer's Letter to the Editor of *The Times* newspaper on 'The Recognition of Governments', January 9, 1950, and H. W. Kaufmann, *British Policy and the Independence of Latin America, 1804–1828,* 1951.

[52] See H. A. Smith, *The Crisis in the Law of Nations,* 1947, p. 19; H. Lauterpacht, *Recognition in International Law,* 1947, p. 110; and T. C. Chen, *The International Law of Recognition,* 1951, pp. 126–127.

[53] [1921] 3 K.B. 532 at 546 (*per* Bankes, L.J.).

[54] *Ibid.,* at p. 556.

ment within the League of Nations, which for purposes of the admission of new members contented itself with identifying self-government with sovereignty,[55] independence as such came to be a sufficient title-deed for the recognition of a new State, and effective control of the State machinery the test for the recognition of a new government. It became fashionable to describe as an inescapable 'fact' that which it was deemed inopportune to evaluate.[56]

The only safeguard that still remained was the discretionary character of recognition. The United Kingdom threw even this overboard when, at the time of the recognition of the Communist government of China, the doctrine of recognition as a legal duty received official approbation.[57] Admittedly, this argument softened the blow dealt by this action to the United States. It would also have been inadvisable to create a split on this issue between the white and non-white members of the British Commonwealth. Still, was it wise to elevate somewhat apparent considerations of expediency into a hard and fast legal principle, and one so much out of step with a well-tried tradition of British recognition policy?

The change in State practice is reflected in the doctrine of Recognition. It must suffice to illustrate it by a comparison of Lorimer's view[58] with those of a representative contemporary writer. In contrast to the overwhelming evidence furnished by State practice, both Lorimer and Professor Lauterpacht hold that recognition is a legal duty. Lorimer, however, limits recognition in the full sense to civilised communities and draws sharp dividing

[55] See further the present writer's *The League of Nations and World Order*, 1936, pp. 32 *et seq.* and 87 *et seq.*

[56] On the fallacy that recognition of a fact does not involve value-judgments, see further *loc. cit.* in note 23 above, 1951, p. 22.

[57] Observations of H.M. Government in the United Kingdom on the Draft Declaration with regard to the Rights and Duties of States, August 24, 1948 (United Nations, *Preparatory Study concerning a Draft Declaration on the Rights and Duties of States*, 1948, p. 186). Cf. also H. Lauterpacht, *Recognition of Governments* (*The Times* newspaper, January 6, 1950); *loc. cit.* in note 51 above, January 9, 1950, and Sir Gerald FitzMaurice, 'Chinese Representation in the United Nations' (1952) 6 *Year Book of World Affairs*, p. 36 *et seq.*

[58] *The Institutes of the Law of Nations*, Vol. 1, 1883, p. 91 et seq. Cf. also C. W. Jenks, 'The Significance today of Lorimer's Ultimate Problem of International Jurisprudence' (1941) *Grotius Transactions for 1940* (Vol. 26), p. 35 *et seq.*, and A. H. Campbell, 'James Lorimer: A Natural Lawyer of the Nineteenth Century' (1954) *Grotius Transactions for 1953* (Vol. 39), p. 211 *et seq.*

lines between civilised, barbarous and savage communities. As early as 1937, Dr. Lauterpacht had taken Lorimer to task for his classifications.[59] Ten years later, the Whewell Professor stated still more categorically: 'Modern international law knows of no distinction, for the purposes of recognition, between civilised and uncivilised States or between States within and outside the international community of civilised States'.[60] At this point doctrine reaches the other extreme. The standard of civilisation has vanished, and States are supposed to be under a legal duty to recognise even non-civilised States and their governments.

*The General Principles of Law Recognised by Civilised Nations.* In the course of the coalescence of international law and civilisation, the term *civilised nation* acquired a meaning which, by and large, was identical with the maintenance of the rule of law in the Anglo-Saxon meaning of the term in favour of foreign nationals.[61] A State which protected the life, liberty and property of foreigners in accordance with these minimum standards complied with its international obligations and was entitled to be regarded as civilised. Sufficient evidence existed to make it possible to hold that these minimum standards had become rules of international customary law. In any case, there was little doubt that they could be regarded as general principles of law recognised by civilised States. When occasion offered itself, international courts and tribunals, foremost among them the Permanent Court of International Justice, reaffirmed these standards and gave them a still more precise meaning.[62] The first sign of a breach in this rampart was the growing hesitation during the inter-war period to uphold the sanctity of foreign private property. It has been shown elsewhere[63] how precarious, since then, the position has become even in wide areas beyond the pale

59 '*Règles Générales du Droit de la Paix*' (1937) *Recueil des Cours de l'Académie de Droit International* (IV), Vol. 62, p. 256.

60 *Loc. cit.* in note 52 above, p. 31, n. 1. Cf. however, the opinion of the Law Officers of the Crown concerning the state of the Fiji Islands (June 14, 1872), *ibid.*, pp. 80–81, and P. Fauchille, *Traité de Droit International Public,* 1922, Vol. 1, *Première Partie,* pp. 327–328, and Ch. Rousseau, *Droit International Public,* 1953, p. 310.

61 See text to note 35 above.

62 See further *loc. cit.* in note 5 above, pp. 83 *et seq.* and 98 *et seq.* Cf. also Lord Asquith's Award in the *Abu Dhabi Oil Arbitration,* 1951, (1952) 1 *International and Comparative Law Quarterly,* p. 251.

63 'The Protection of British Property Abroad' (1952) 5 *Current Legal Problems,* p. 295 *et seq.*

of Communist totalitarianism. It is, therefore, unnecessary to develop this argument here afresh.

In wide parts of the world, even the minimum standards regarding the protection of the life and liberty of foreign nationals can no longer be taken for granted. Nationals of Western States in the orbit of Communist totalitarianism [64] have found to their cost that their home governments cannot any longer give them any effective protection under international law.[65]

Limitation of space rules out a full analysis of the repercussion of this process on the doctrine of international law. Attention should, however, be drawn to the tendency on the part of writers to refrain from an analysis of the words 'recognised by civilised nations' in their treatment of the general principles of law or to treat these words as redundant.[66] From this point of view, the twilight of this subsidiary source of international law in the Soviet doctrine of international law is especially significant.[67] This may explain the curious reformulation of Article 38 (1) (*c*) by Judge Krylov as general principles of law 'recognised by the nations'.[68]

The process of flouting traditional concepts of international law by States within the Russian orbit does not necessarily stop at the point of a divorce of international law from civilisation. It has reached the crucial point where serious doubts have arisen in Western minds whether, in the relations with these States, that minimum of good faith can still be taken for granted without which even treaty relations on any major topic can hardly any longer be contemplated.[69] While this issue raises still more funda-

[64] A recent judicial description of this type of regime may be found in the judgment of Cassels, J., in *Re Kolczynski and others* [1955] 1 All E.R. 31 at 33.

[65] For the evidence, cf. *loc. cit.* in note 50 above, *Grotius Transactions for 1950*, p. 259 *et seq.*

[66] See, for instance, E. Ruck, *Grundsätze im Volkerrecht*, 1946, p. 13.

[67] On the more recent developments, cf. I. Lapenna, *Conceptions Soviétiques de Droit International Public*, 1954, p. 161 *et seq.*

[68] Dissenting Opinion in 'Reparation for Injuries suffered in the Service of the United Nations', *I.C.J. Reports 1949*, p. 219. Cf. also S. B. Krylov, '*Les Notions Principales du Droit des Gens*' (1947) *Recueil des Cours de L'Académie de Droit International* (I), Vol. 70, p. 449.

[69] On statements to this effect by responsible United States statesmen, see *loc. cit.* in note 50 above, p. 266. Cf. also *ibid.*, p. 261 *et seq.*, and Ann van Wynen Thomas, *Communism versus International Law*, 1953.

The same view underlies the judgments in *Re Kolczynski and others* (*loc. cit.* in note 64 above). After paying formal tribute to the principle that 'the Court must not assume that the foreign State will not observe the terms of the (extradition) treaty', Lord Goddard, C.J., considered it

mental problems than are within the compass of this paper, little doubt remains that, in so far as these countries are concerned, international law has ceased to be an effective safeguard of the minimum standards of international law as applied between civilised States.

*The Law of War.* In the pre-1914 era, it was still possible to envisage that, in fields not codified at the Hague Conferences of 1899 and 1907, 'the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilised peoples, from the laws of humanity, and the dictates of the public conscience'.[70] The First World War, however, soon taught three hard lessons. First, public opinion in neutral countries counts more in wars in which powerful nations stand aside than in world wars in which all greater powers are involved.[71] Secondly, once the principle of negative reciprocity by way of reprisals and counter-reprisals is at work, as has been the case in particular in the field of maritime warfare, the law tends to be modified in a manner which happens to suit the convenience of the power applying such measures. Thirdly, when one side, especially the one in danger of otherwise losing the war, hopes to avert this fate by the use of 'miracle' weapons—as, for instance, Imperial Germany imagined unrestricted submarine warfare to be—the temptation to break established rules of warfare and neutrality tends to become irresistible.

The First World War also foreshadowed other disintegrating trends which, in the Second World War, became more clearly visible: the growing unreality of the distinction between combatants and non-combatants, the increasingly impersonal charac-

necessary, 'if only for reasons of humanity, to give a wider and more generous meaning to the words we are now construing' than in the case of a country which could be relied on not to institute criminal proceedings for non-extraditable offences (at pp. 35–36) and Cassels, J., expressly held that if the applicants were extradited for non-political offences under the Extradition Treaty between Poland and the United Kingdom of January 11, 1932, they might well only be tried for such offences, but, in fact, punished as for an offence of a political character (*ibid.*, at p. 34). Cf. also L. C. Green, 'Recent Practice in the Law of Extradition' (1953) 6 *Current Legal Problems*, p. 283 *et seq.*

70 Para. 9 of the Preamble of Hague Convention IV, October 18, 1907 (J. B. Scott (editor), *The Hague Convention and Declarations of 1899 and 1907*, 1915, pp. 101–102). Cf. also above text to note 39 *et seq.*

71 See further the present writer's *International Law and Totalitarian Lawlessness*, 1943, p. 30 *et seq.*

ter of warfare and the transformation of two-dimensional into three-dimensional war.[72]

In so far as war crimes *stricto sensu* were concerned, the war crimes tribunals established in the wake of the Second World War limited themselves to the punishment of misdeeds which had not been essentially affected by these developments.[73] Thus, they could avoid coming to grips with the major problems presented by the unparalleled advances of modern technology. In the absence of more than embryonic rules of air warfare, technology could celebrate its orgies of destruction. Words such as carpet bombing or saturation bombing became technical terms. Hitler's V-weapons indicated the potentialities of long range guided missiles, and the competitive hunt by the Allies of a war only just ended for the German V-weapons experts was an augury of things to come.

Well-founded anxiety that, at last, technology had reached the point when total war and civilisation had become incompatible became deadly certainty with the advent of nuclear weapons.

It has been suggested that it may be possible to limit the use of such weapons to tactical military purposes. The military experts on the Commission of Experts summoned by the International Red Cross Committee and the International Red Cross Committee itself do not appear to be impressed by such arguments.[74] A variant of this school of thought draws comforting analogies from the absence of gas warfare in the Second World War. It is, however, perhaps not entirely irrelevant that the development of nuclear weapons has been accompanied by the discovery of the strategy of the 'first crippling blow'.

Still others, undeterred by a host of broken treaties, rely on their interpretation of the Geneva Protocol of 1925 and consider

[72] See further J. M. Spaight, *Blockade by Air,* 1942; *Bombing Vindicated,* 1944; 'Legitimate Objectives in Air Warfare' (1944) 21 *British Year Book of International Law,* p. 158 *et seq.*; Sir Arthur Harris *Bomber Offensive,* 1947; H. A. Smith, *loc. cit.* in note 52 above, p. 67 *et seq.,* and Stone, *loc. cit.* in note 4 above, p. 335 *et seq.*

[73] Cf. *loc. cit.* in note 5 above, p. 308 *et seq.*

[74] International Red Cross Committee, *Summary of the Opinions expressed by the Experts,* 1954, p. 2, and *Collection of Constitutional Texts and Documents concerning the Legal Protection of Populations and War Victims from the Dangers of Aerial Warfare and Blind Weapons,* 1954, p. 84. Cf. also Sir Winston Churchill's Speech in the House of Commons, *loc. cit.* in note 1 above, cols. 1901 and 1905.

that the use of nuclear weapons is implicitly prohibited by this convention. Even if this were so, the United States of America has never ratified the Protocol, and a number of States, including the members of the British Commonwealth and the Soviet Union have made reservations which, in fact, give them in any major war practically a free hand.[75]

It is interesting to observe the manner in which the problem is attacked in the latest edition of Oppenheim's *International Law*. The learned editor concedes that the use of atomic weapons[76] is possibly contrary to international law.[77] Even so he adds the unavoidable *caveat* that such weapons may be used by way of reprisal against a power which has been the first to use atomic weapons, and its allies. The réal point of the argument, however, becomes only apparent from a modestly hidden footnote: 'Moreover, as laws are made not only for the protection of human life but also for the preservation of ultimate values of society, it is possible that should those values be imperilled by an aggressor intent upon dominating the world the nations thus threatened might consider themselves bound to assume the responsibility of exercising the supreme right of self-preservation in a manner which, while contrary to a specific prohibition of International Law, they alone deem to be decisive for the ultimate vindication of the law of nations'.[78]

In the Second World War, it was probably still possible to regard totalitarian aggression as an attack on world civilisation and to contemplate the international outlawry of the aggressor States within limits compatible with the standard of civilisation.[79] Now, however, we happen to 'co-exist' in a divided world, in which each side suspects the other of aiming at world domination. In any such contingency as is contemplated in this illuminating footnote, the Security Council of the United Nations would be

[75] 94 League of Nations Treaty Series, 1929, pp. 69 and 71. Cf. also the Note of the United Kingdom Government to the Government of the Soviet Union of February 3, 1955 (*The Times* newspaper, February 4, 1955).

[76] Since the experiments carried out with thermo-nuclear weapons by the United States in April/May, 1950, foreshadowed by President Truman's Statement of January 31, 1950, and the experimental explosion of a hydrogen bomb at Eniwetok, in November, 1952, probably every one of Professor Lauterpacht's arguments on grounds of principle gains additional weight.

[77] Vol. 2, 1952, p. 347 *et seq.*

[78] *Ibid.*, p. 351, note 2.

[79] Cf. *loc. cit.* in note 71 above, pp. 82 *et seq.* and 109–110.

constitutionally incapable of determining the identity of the aggressor. It is, therefore, not even necessary to envisage the difficulties arising from any attempt to ascertain the relevant facts in such an emergency. Thus, Oppenheim's *International Law* supplies, in advance, the legal advisers of Service departments east and west of the world frontier with the most obvious *ex post* arguments.[80]

Actually, the technique of an inoperative text and operative footnote has a distinguished ancestry. For our immediate purposes, it suffices to trace it back to the Second General Lateran Council of 1139 which ordains: '*Artem autem illam mortiferam et Deo odibilem ballistariorum et sagittariorum adversos Christianos et catholicos exerceri de caetero sub anathemate prohibemus*'.[81] It will be observed that non-Christians and heretics do not partake of the protection of this rule. Yet the gloss was still to be written. This was done by Bottonus (d. 1266). According to this interpretation, which was generally accepted, the prohibition of these weapons did not apply to a just belligerent in a just war.[82]

In fact, it matters but little whether the use of nuclear weapons is contrary to international law. The foremost political and military leaders of the North Atlantic Treaty Organisation have made no secret of it that Western strategy is based on the 'philosophy of massive retaliation' and on the use of nuclear weapons.[83] At the same time, they leave no doubt about it and assert that, in no circumstances, will they resort to a preventive war. Unfortunately, it matters little whether we believe them.

[80] See further (1954) 8 *Year Book of World Affairs*, p. 340 *et seq.* Cf. also H. Lauterpacht, 'The Revision of the Law of War' (1952) 29 *British Year Book of International Law*, p. 369 *et seq.*

[81] J. D. Mansi, *Sacrorum Conciliorum Nova, et Amplissima Collectio*, 1776, Vol. 21, p. 534.

[82] *Decretalium Gregori IX, lib.* V, *tit.* XV, *cap.* 1, *De Saggittariis*, Gloss of B. Bottonus, compiled by St. Raymund de Peñaforte, 1470. Cf. also E. Nys, *Les Origines du Droit International*, 1894, p. 192.

[83] See, for instance, the speeches of Field-Marshal Lord Montgomery (*The Times* newspaper, May 25, 1954) and of General Gruenther, Supreme Allied Commander in Europe (*ibid.*, June 9, 1954); the leading article on 'Great Deterrent?' (*ibid.*, June 10, 1954); United States Information Service, *Daily Wireless Bulletin*, December 18, 1954, p. 3; *ibid.*, December 21, 1954, p. 4; observations made on December 21, 1954, by Mr. Dulles, U.S. Secretary of State, on 'World-wide U.S. Military Deployment' (*United States Information Service*, December 23, 1954), and the United Kingdom *Statements on Defence, 1954* (Cmd. 9075) and *1955* (Cmd. 9391).

The question is whether the other side has faith in the sincerity of these protestations. It would be difficult to be dogmatic on this point, for Marshal of the Royal Air Force Sir John Slessor voiced the views of many when, regarding Russian intentions, he expressed a view which is likely to be reciprocated in the Kremlin: 'I do not delude myself that they would be debarred from any course, however murderous, by ethical considerations or any feelings of humanity'.[84]

If, therefore, the contingency of a Third World War were ever to arise, the one matter on which military experts appear to be agreed is that both sides would use nuclear weapons. If such action were contrary to international law, then international law would be broken in the interest of the 'ultimate vindication of the law of nations'.[85] If the use of such weapons were not illegal, this would merely indicate the irrelevance of international law from the point of view of civilisation in any such contingency. In either case, mechanised barbarism would be the result.

Here the crucial point is reached. Lapses from the standard of civilisation regarding relatively minor, though by no means unimportant, matters, such as Recognition or the Minimum Standards of International Law, can be remedied. Violation of the rules of warfare is also not exactly a novel problem, nor is the fact that, *de lege lata,* certain aspects of warfare are not subject to generally accepted rules of international law. What is new is this: Each of the two sides in such a potential world contest cherishes certain values of its own way of life higher than peace and is resolved, in such a contingency, rather to risk co-extermination than defeat or surrender. At one point or another of the world frontier, one side or the other is always tempted to experiment with policies of calculated risk. Whenever it is engaged in such an endeavour, it relies on the fear of the other side to enlarge the issue. It would be sanguine to assume that such co-existence under fear is more than the breathing space of another inter-war period.[86] Yet while it lasts there is still hope.[87]

[84] *The Times* newspaper, January 29, 1955.
[85] Cf. the text to note 78 above.
[86] For a searching analysis of this 'cold peace', a 'provisional calm, whose duration is conditional upon the changeable sensation of fear and upon the varying calculation of present strength', see the Pope's Christmas Message of December 24, 1954 (Translation by the Vatican Press Office).
[87] Cf. A. Schweitzer, *The Problem of Peace in the World of Today,* 1954.

In Collingwood's pregnant terminology,[88] every social problem can be treated in an eristic or dialectical manner. The one means settling disagreement by imposition of one's own will on the opponent. The other is a 'constant endeavour to convert every occasion of non-agreement into an occasion of agreement'.[89]

Admittedly, in group relations as well as in personal relations it takes two to arrive at a constructive solution of any issue. The contribution which the international lawyer as such can make to this end is limited. He must be content to point out the ominous character of a movement which has first led to a coalescence of international law and civilisation, but, on a global level, appears now to point towards the evanescence of the standard of civilisation from international law. If any particular international lawyer also happened to be a student of political science and international relations, he might be able to explain the reasons for this disturbing degeneration or even suggest available remedies.[90] Yet if a persistent questioner should insist on putting the pertinent question how such dialectical agreement could be possibly attained in a world rent apart by another Babylonian confusion of tongues, the reply might well be that the picture of the Tower of Babel itself is the answer. It is not only the symbol of human *hybris,* but also carries a positive message for those with eyes to see and, probably, the only one which is commensurate to this overriding problem of our age.

[88] Cf. *loc. cit.* in note 12 above, pp. 225 *et seq.* and 326 *et seq.*
[89] *Ibid.*, p. 326.
[90] See further *loc. cit.* in note 23 above, 1951, p. 725 *et seq.*, and 'The Frontiers of International Law' (1952) 6 *Year Book of World Affairs,* p. 246 *et seq.* Cf. also E. E. Harris, *The Survival of Political Man,* 1950.

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# APPENDIX

## ASPECTS OF GENERAL PRINCIPLES OF LAW TREATED IN PREVIOUS VOLUMES OF *CURRENT LEGAL PROBLEMS*

In view of the possibility that the International Committee of Comparative Law may organise at a future date a World Conference on General Principles of Law recognised by civilised nations,[1] some of the contributions in this volume are related to this topic. It was, therefore, thought helpful to draw the attention of readers to other relevant contributions in previous volumes of *Current Legal Problems*. The editors are obliged to Dr. B. Cheng for having compiled this Appendix. *The Editors.*

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[1] Cf. above, p. 213.

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